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The creation of specialized procedures for dealing with children in need of care by the state has been a common occurrence throughout history. The particular vulnerability of children has contributed to the development of the legal principle of parens patriae whereby the state may intervene in the parent-child relationship when certain conditions are present. Initially such intervention required child neglect or dependence, but at the end of the nineteenth century, parens patriae jurisdiction was applied to youthful offenders in the United States who otherwise would be tried in criminal courts. The hope was that by relaxing the rules of procedure in the court hearing and by eliminating various aspects of punishment, the young miscreant could be molded into a useful member of society.

Taking their cue from the 1899 Illinois juvenile court statute, all other states in the Union have adopted a

juvenile court system, as did the federal government. There developed wide variation in the structural and procedural requirements of juvenile courts. Moreover, as time passed, theory was seen to be unmatched by practice. Delinquency came to carry much the same stigma as did the label of criminal, and rehabilitation programs were frequently found to be designed not so much to rehabilitate the offender as to punish him. Further, the resources available to juvenile court judges were often inadequate to meet even minimum standards of procedural fairness, much less the overly optimistic predictions of early court proponents.

Following increased questioning of the entire American juvenile justice system, the Supreme Court of the United States in 1967 handed down a decision of momentous import in this field. In In re Gault the court recognized the many problems facing juvenile courts and specifically required certain standards to be met in establishing delinquency. Fundamental fairness sufficient to meet the requirements of due process of law was thus guaranteed to accused delinquents in state courts.

Those states whose juvenile courts had been operating at the borderline of constitutional propriety are now being obliged to provide new operational guidelines for juvenile court officials. Illinois, as one of a number of states revising its juvenile court statute just prior to Gault, is in some respects immune from major impact problems, but in

other areas is subject to constitutional challenge. Through an analysis of existing statutory requirements and constitutional mandates presently required and those likely to be of issue in future years, this dissertation suggests changes in the Illinois law designed to place that state's juvenile courts in a constitutionally secure position.

JUVENILE JUSTICE AND IN RE GAULT: AN ANALYSIS OF PROCEDURAL ALTERATION IN JUVENILE COURTS WITH SPECIAL REFERENCE TO ILLINOIS

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PREFACE

The juvenile court movement in the United States may be properly viewed as an effort to utilize the power of the state to re-orient youth who have manifested anti-social behavior. These twentieth-century legal structures were intended to regard young offenders as products of their surroundings and to concentrate on rehabilitation rather than punishment. The desired effect was to remake the young miscreant into a socially responsible member of society.

These desirable goals were the basis for authorizing the juvenile courts to use informal procedures which were in vivid contrast with the stress upon procedural due process in the ordinary criminal courts. Such informalities as were implemented encountered relatively little criticism during the years when the juvenile court movement was widely regarded as a desirable experiment in social reform. More recently, and from the highest court in the land, there has been a growing insistence that the administration of justice for young offenders conform to various of the procedures enforced as safeguards for those proceeded against in the ordinary criminal courts.

Today, accordingly, state after state has reviewed and revised the workings of the courts handling delinquency cases, and something of a "revolution" in the administration

of juvenile justice is at hand. This study concentrates upon the resulting transformations in juvenile court procedures, particularly in Illinois although some comparative data from selected other jurisdictions is included.

The analysis is essentially in the traditional legal mold, though backgrounded by insights obtained from a variety of sources. Empirical examination of actual court operations to determine the precise impact of changes already compelled and of alterations that appear imminent would be a logical supplement. It may be hoped, in addition, that this study will serve as a prolegmena to future impact studies.

The writer would like to express particular appreciation to Professor Jack Isakoff for his efforts in the completion of this dissertation. His suggestions and criticisms were essential to its completion. The other members of the dissertation committee also provided valuable assistance to the writer.

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CHAPTER I

JUVENILE COURT MOVEMENT: ORIGINS AND EARLY DEVELOPMENT

The cornerstones of the juvenile court movement provide a useful historical perspective to an understanding of the acceptance obtained by the theory that very young persons involved in anti-social behavior should not be turned over to the criminal courts for processing in much the same manner as adult offenders against the law. Those foundations are also material to an appreciation of recent demands for adapting to juvenile court procedures additional protections for their prospective wards.

Definitional Problems

Herbert Lou, author of one of the first comprehensive histories of juvenile courts in the United States, has described juvenile courts as ". . . having special jurisdiction of a parental nature over delinquent and neglected children."[1] He might well have added the term "dependent" to the categories of juveniles subjected to the jurisdiction he mentions, for this is frequently included in

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[1]Herbert H. Lou, Juvenile Courts in the United States (Chapel Hill, North Carolina: University of North Carolina Press, 1927), p. 32. Also see Black's Law Dictionary (4th ed. rev., 1968), "Juvenile Court," p. 1005.

the defined scope under many state statutes.

What is implied in the "special jurisdiction of a parental nature" is reasonably standard across the country. Generally the "special jurisdiction" exercised by juvenile courts has limited their authority to specified classes of cases involving defined categories of children, although adults, under the provisions of some statutes, may be subject to juvenile court jurisdiction. The "parental nature" of such "special jurisdiction" indicates that the state was acting as a surrogate parent.

The terms "delinquent," "neglected," and "dependent" can best be explored at a later point in connection with particular statutes. Generally, however, the first of these terms refers to a youthful offender whose acts if committed by an adult might be regarded as of a criminal nature. Neglected and dependent children, on the other hand, are more likely to be those needing protection rather than reformation.

While the term "juvenile court" is a handy and widely understood identification of the tribunals exercising the jurisdiction under discussion, such courts may also have at least limited authority over various categories of adults in their relations with children. Thus, the name "family court" is frequently encountered. In any event, however, the focus is regularly upon children occupying the legally defined categories, and more incidentally if at all upon

the adults in their environment.

Fundamental to any attempt at defining the term "juvenile" is, of course, the concept of chronological age. At common law, children under seven years of age were presumed incapable of forming the criminal intent necessary to support conviction for a crime, those aged seven through thirteen had a rebuttable presumption on the same score in their favor, while those aged fourteen and upwards were treated as adults under the criminal law.[1] Various modifications of these rules were effected by statutory action, but liberalizations did not approach the higher age limits found in such areas as contract law and domestic relations regulations. In these areas children were often not considered adults until they reached their majority.[2] This concept may have had its origins in Great Britain in the Nineteenth Century. This seems to have been made most clear by the following statement taken from a report on juvenile criminals as quoted in Grace Abbott's The Child and the State:

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[1]For a general discussion on this point, see William S. Fort, "Gault -- Adversity or Opportunity?" Judicature, LI (August-September, 1967), 56, and for information about Illinois law, see Maskaliunas v. Chicago W.I.R. Co., 318 Ill. 142, 149 N.E. 23 (1925).

[2]For a concise discussion of the legal status of juveniles, see Norman Lefstein, Vaughn Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice: Gault and Its Implementation," Law and Society, III (May, 1969), 553-557. Among other points, they demonstrate why a juvenile cannot be bound by most of his contracts.

> In the English law, . . . children are considered incapable of guiding themselves, they are therefore entirely submitted to the guidance of their parents; . . . But the moment the child shows he is really incapable of guiding himself by committing a crime, from that moment he is treated as a man. . . . He is tried in public and all the pomp and circumstance of the law is exercised towards him as to a man, while his father is from that moment, according to the present law of the land, released from obligation to maintain him.[1]

Thus, in some civil matters children were deemed not responsible for their actions while children over seven could be held criminally liable for law violations.

Juvenile court statutes tended to alter this situation by placing juveniles in a special category of delinquent offenders against the laws of the state. Inclusion of older children under the jurisdiction of juvenile courts has been the general trend. By far and away the greater number of jurisdictions have set their upper age limits in the sixteen to eighteen year range.[2] Congress, for example, has determined that the term "juvenile" includes persons who have not attained their eighteenth birthday and that "juvenile delinquency" is ". . . the violation of a law of

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[1]Grace Abbott, ed., The Child and the State II (Chicago, Illinois: University of Chicago Press, 1938), p. 323.

[2]Frederick B. Sussmann, Law of Juvenile Delinquency (2nd ed. rev., Legal Almanac Series, No. 22; Dobbs Ferry, New York: Oceana Publications, 1959), p. 18, and Paul W. Tappan, "Children and Youth in the Criminal Court," The Annals of the American Academy of Political and Social Science, CCXLI (January, 1949), 129-130. Hereafter this latter source will be cited as follows: The Annals.

the United States committed by a juvenile and not punishable by death or life imprisonment."[1]

The "special category" of clients appearing before juvenile courts has required utilization of procedures unlike those in traditional criminal or civil proceedings. Again the wide variation within the United States must be emphasized in order to avoid giving the mistaken impression that the methods used throughout the country are identical or even similar. This procedural variation is due to such factors as the requirements of the statute establishing the court, the philosophy and training of the judge, the work load of the court, the availability of staff aids, the quality of the physical plant, and even the prevailing attitudes within the community.

Hearings in juvenile courts have traditionally been characterized by a relaxation of the rules of procedure commonly associated with criminal and civil courts. Because an adjudication of delinquency, dependency, or neglect was viewed as basically non-criminal, there was commonly deemed no need to include the specific protections afforded accused criminals by the federal Constitution and

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[1] 18 U.S.C. sec. 5031 (1964). For further discussion, see John F. Byerly, "Sentencing the Juvenile Offender," Federal Probation, XXVI (June, 1962), 23-26, and Sarah T. Hughes, "Trial of Juvenile Delinquents in Federal Courts," in Law Enforcement and the Juvenile Offender (Springfield, Illinois: Charles C. Thomas, Publisher, 1963), p. 80.

various state constitutions.[1] The traditional role of the judge in Anglo-American jurisprudence was altered from that of an "umpire" to that of an active participant in the process. This shift toward the inquisitorial as opposed to the adversary method of procedure was, in theory at least, accompanied by reliance on trained scientific personnel by the court in its adjudication and treatment programs of juveniles. "Quasi-chancery" is the term used by some writers to label juvenile courts,[2] and is perhaps best identified as "quasi-inquisitorial" in nature.

In a very real sense the judicial function was supplemented with educational, social, and rehabilitative goals. Acting as a kind of coordinator for a multi-faceted attack on the causes of delinquency, dependency and neglect, the juvenile court was intended to bring to bear the modern tools of science and medicine.[3] Retention of the traditional judicial role in the settlement of disputes would not

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[1]Leo J. Yehle, "The Role of the Juvenile Court in Our Legal System," Marquette Law Review, XLI (Winter, 1957-58), 284-286.

[2]Lou, Juvenile Courts, p. 33, and Edward F. Waite, "The Outlook for the Juvenile Court," The Annals, CV (January, 1923), 232. By "quasi-chancery" Lou and Waite would seem to mean that juvenile courts are not found in the common-law court tradition but rather, like courts of chancery, attempt to reach an equitable solution for justiciable problems lying outside the reach of common law precedents. Because their jurisdiction was limited to children, the prefex "quasi" was deemed appropriate.

[3]See Waite, "The Outlook," p. 232.

be eliminated, rather it would be modified and improved. One writer described this new trend as a break with past legalisms designed to permit scientific determination of the existence of a need for rehabilitative treatment.[1] Acting on this theory, criminal action by juveniles should be analyzed as symptoms of character or environmental deficiencies to be treated under the guiding hand of the court. As will be seen, there is a considerable gap between the claims of juvenile court proponents and actual results. The enlarged functions of the court constitute a source of criticism both from some who view this new emphasis as improper[2] and even more from those who claim it is an "unfulfilled promise."[3]

Juvenile courts devote a far greater proportion of their energies to the task of dealing with alleged delinquency, as contrasted with their dependency and neglect jurisdiction. Perhaps the most accurate if nonspecific definition of delinquency would be Sol Rubin's observation that juvenile delinquency ". . . is what the law says it

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[1]Paul W. Tappan, "Treatment without Trial," in The Problem of Juvenile Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), p. 220.

[2]Jesse Olney, "The Juvenile Courts -- Abolish Them," The State Bar Journal of the State Bar of California, XIII (April-May, 1938), 1-6.

[3]Orman W. Ketcham, "The Unfulfilled Promise of the American Juvenile Court," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), pp. 22-43.

is."[1] Certainly it is a legal concept, as already noted, but one having sociological overtones. Most commonly legal definitions start with violations of laws by children but include in the category such various vague terms as "incorrigibility," "idleness," "habitually using obscene language," and many others.[2] American Jurisprudence makes the following observation:

> Generally, delinquent children, within the meaning of statutes relating to juvenile courts and delinquencies, are children who have committed offenses against the law, or who are found to be falling into bad habits, or to be incorrigible, or who knowingly associate with vicious or immoral persons, or who are growing up in idleness and crime. . . . As distinguished from crime, delinquency usually implies a psychological rather than a judicial attitude toward the juvenile. Whether a child is chargeable with delinquency is sometimes a question of fact to be determined from the particular circumstances.[3]

If the juvenile is adjudged delinquent by the court, he is then subject to the various treatment programs at the court's discretion.

This label of delinquency not only reflects the prevailing values of society, as set forth in the statutes, but also is indicative of the values of the various court

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[1]Sol Rubin, "The Legal Character of Juvenile Delinquency," The Annals, CCLXI (January, 1949), 1.

[2]Sussmann, Law, pp. 21-22.

[3]Am. Jur., "Juvenile Courts," sec. 36.

officers involved in the adjudication.[1] Police, who bring a great proportion of the cases to the court, must decide in the first instance what constitutes delinquent behavior by a youth. An intake officer of the court must then decide if the case actually warrants the attention of the judge. Sometimes the local prosecuting attorney has an option between a criminal prosecution and a delinquency action. In each instance these decisions rest to some degree on the basis of their values as to the meaning of such vague terms in the juvenile court law. And, of course, the judge, often at the recommendation of the probation officer or other court assistant, must render the final decision as to the juvenile's status and needed treatment, if any. Depending upon one's point of view, this aspect of juvenile court procedure may be described as "necessarily flexible" or as "dangerously arbitrary."

At the outset of the juvenile court movement in the United States its proponents held the firm conviction that no fundamental difference existed between delinquency on the one hand and dependency and neglect on the other. Judge Julian Mack of the Cook County Juvenile Court asked:

> Why is it not just and proper to treat these juvenile offenders, as we deal with neglected children, as a wise and merciful father handles his own

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[1]For a discussion of hidden values in delinquency statutes, see Sophia M. Robison, "Juvenile Delinquency," Current History, LII (June, 1967), 341-348.

> children whose errors are not discovered by the authorities.[1]

This was a view that much as the dependent or neglected child was caught in a web of circumstances beyond his control, so too was the delinquent youth. The only difference between the two was that the delinquent had reacted to his adverse condition while the others had not yet done so. Both categories were viewed as existing not because of willful choice, but resultant from an undesirable social melieu.

There has, however, been only a partial acceptance of the view that children are children, be they allegedly delinquent, neglected, or dependent. Provisions for turning some delinquents over to the regular courts evidence this, as does the very persistence of the three-fold classification in the statutes.

Subtle nuances are present even within the separate grouping of neglect and dependency jurisdiction. American Jurisprudence distinguishes between the two concepts:

> The term "neglected child" is broader than the term "dependent child." Neglect is the failure to exercise the care that the circumstances justly demand. It is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances change. . . . The law contemplates an existing condition of dependency that requires the intervention of the

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[1]Julian W. Mack, "The Juvenile Court," Harvard Law Review, XXIII (December, 1909), 107.

> juvenile court, and not what the situation might be in the future.[1]

"Dependency" often takes the literal meaning of the term, that is a juvenile who is dependent upon another for support, or the definition may be narrowed to include only those youths who are dependent upon the public for support.[2] Whereas an adjudication of "dependency" may often involve no negative reference to the child's guardian, "neglect" cases frequently involve adults because of their alleged unwillingness to perform their legal responsibilities toward children in their care.

Regardless of the kind of jurisdiction exercised by the court, a necessary feature of its proper function has been avoidance of the notion of criminality. If juveniles are to be saved from future careers as criminals, the state could hardly commence this procedure by so labeling them at the outset of court action. Accordingly, new names have been given to juvenile court operations in order to distinguish them from criminal courts. Instead of a "warrant" being issued for the arrest of an offending child, a "summons," similar to that used in civil courts, is served to force appearance before the court.[3] "Indictment" by

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[1] Am. Jur., "Juvenile Courts," sec. 37.

[2] For discussion on this point, see In re Campbell, 323 Mo. 757, 19 S.W.2d 752 (1929).

[3] For further comment, see Herbert A. Bloch and Frank T. Flynn, Delinquency: The Juvenile Offender in America Today (New York, New York: Random House, 1956), pp. 340-341.

grand jury is replaced by the filing of a "petition" in regard to the child. Detention facilities separate from those used for adults are in many jurisdictions required. A "hearing" rather than a "trial" is the core adjudication activity. Private, rather than public proceedings are to be held. Legal rules of procedure are relaxed at the hearing. The "sentence" is replaced by the "court disposition" involving "treatment" to save the child rather than "punishment" for a previous action. All of these characteristics of juvenile courts have had as their purpose the elimination of the stigma of criminality otherwise attaching to those appearing before it.

Critical commentators concerned with the terminology utilized in juvenile courts have tended to focus their attention on the lack of precision in the term "delinquency." The crux of their complaint, as specified by one critic is that:

> . . . [W]ith a vague definition of delinquency, judges and probation officers are allowed scope (harmful in proportion to their lack of skill, training, and knowledge) for moralizing. Thus, what offense will, as an offense, require treatment (perhaps actually lead to an unreasoning and even diabolic reaction) may vary from judge to judge, from officer to officer, from court to court.[1]

One former member of the Standard Juvenile Court Act committee of the National Council on Crime and Delinquency

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[1]Frederick W. Killian, "The Juvenile Court as an Institution," The Annals, CCLXI (January, 1949), 99.

holds the view that the typical statutory definition of delinquency may, given the general inadequacy of probation staffs and training for juvenile court judges,[1] impede the proper handling of juveniles who are offenders against the law and fail to help juveniles who did not violate the law but are nevertheless before the court.[2]

The trend toward enlarging the meaning of delinquency has contributed to the heavy work load of juvenile courts. If violation of the penal code is the sole path leading to a declaration of delinquency, juvenile courts could conceivably devote more time to the fewer number of cases that would come before them. Moreover, the larger load which the typical broad definition may bring about, may cause the court to engage in unauthorized or at least unduly relaxed actions in order to keep abreast of its workloads.[3] Yet, too narrow a definition may leave some juveniles free of court enforced discipline at the stage where they could most readily be reoriented.

Although the term "delinquency" has received proportionately greater attention of court critics, the remaining

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[1]See below at page 100 for additional comment on the resources available to juvenile courts.

[2]Rubin, "The Legal Character," p. 3.

[3]See Paul W. Tappan, "Unofficial Delinquency," in The Problem of Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), pp. 296-303.

terminology has not escaped negative comment. The following observation illustrates the scope of attacks levelled against juvenile court terminology:

> By a convenient but highly misleading sophistry, it is maintained that the child is not charged with a "crime," "convicted" as a "criminal," nor "sentenced to a punishment." Rather, he is merely "adjudicated" under a "petition" as a "delinquent," studied to determine how he may be "saved," and then "treated" in his own best interest. The slightest inspections of the characteristic methodology and personnel of children's court, the detention facility, or the training school, should disillusion any but the most ingenuous about these euphemisms.[1]

Comments like the one above are partially a semantical polemic; but they are also indicative of the fundamental problems facing juvenile courts. Attempts to remold the terminology surrounding this institution have as their goal basic changes in court authority and operation.

Juvenile Court Philosophy

Discovering and ranking the crucial philosophical building blocks of any human institution is a risky undertaking. The options are many, the guidelines vague, and the authorities prolific and often inconsistent. Two concepts, however, predominate in the philosophical foundations of juvenile courts: *parens patriae* and individualized justice.

The *parens patriae* concept is the traditional legal foundation for the establishment of special institutions

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[1] *Ibid.*, p. 197.

and procedures to deal with children who have violated existing social rules governing permissible behavior. In its broadest meaning parens patriae, as developed in feudal Great Britain, referred to the widely accepted view that the king in his capacity as symbol of the nation was the ultimate guardian of those under legal disabilities within his reign.[1] Although the number of categories included in this broad phrase, "those under legal disabilities," was a dynamic one, that of dependent and neglected children seems to be one of the most enduring. Children were long considered wards of the crown and it had supervision of their estates received by inheritance. During the reign of Henry VIII such crown supervision was transferred to the Court of Wards and Liveries, and in 1660 such jurisdiction was given to the Court of Chancery. It was here that the king in his capacity as parens patriae assumed the protection of all infants through his chancellor, the keeper of the king's conscience.[2]

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[1]Don H. Young, Jr., "The Constitution and the Juvenile Court -- Letter or Spirit?" Judicature, XLIV (October, 1960), 96. For an authoritative review of the parens patriae concept in English law, see Sir William Holdsworth, A History of English Law VI (2nd ed.; London, England: Methuen and Co., 1966), p. 648, and Sir Frederick Pollock and Frederick W. Maitland, The History of English Law II (2nd ed.; Cambridge, England: Cambridge University Press, 1968), p. 445.

[2]Frank W. Nicholas, "History, Philosophy, and Procedures of Juvenile Courts," Journal of Family Law, I (Spring, 1961), 152.

It should be noted, however, that this earliest use of the power of parens patriae related not to criminal action by children, but rather to the protection of property belonging to dependent children. This distinction is of considerable importance in the determination of the legal nature of juvenile court procedure and jurisdiction in the United States. Although the English Chancery Court was thus imbued with parens patriae power over a child's welfare, it was seldom exercised.[1] Generally in English practice this was limited to wealthy minors. Neither the punishment of parents nor the protection of society was a relevant criterion for judicial intervention.[2] One of the earliest cases in English jurisprudence dealing with such matters was Eyre v. Shaftsbury:

> . . . /T/he King is protector of all his subjects; that in virtue of his high trust he is more particularly /able/ to take care of those who are not able to take care of themselves, consequently of infants who by reason of their non-age are under incapacities.[3]

According to one writer, the extension in Great Britain of parens patriae authority to non-property rights

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[1]John N. Pomeroy, ed., A Treatise on Equity Jurisprudence (5th ed.; Rochester, New York: Lawyer's Co-op, 1941), sec. 1307.

[2]Ketcham, "Unfulfilled Promise," p. 23.

[3]24 Eng. Rep. 659, 666 (1722). For case upholding parens patriae concept, see Wellesley v. Wellesley, 4 Eng. Rep. 1078 (1828).

began during the early decades of the nineteenth century.[1] In Shelley v. Westbrooke[2] the poet Percy Bysche Shelley had his children taken from him because he was adjudged immoral. Apparently the "rights" of his children, as guarded by the crown, included protection from the undesirable influences surrounding their father. This broadening of authority was sanctioned by the House of Lords in a similar case dealing with divestiture of parental rights. Lord Redesdale, expressing the view of the House, said:

> We find that now, for a hundred and fifty years, the Court of Chancery has assumed an authority with respect to the care of infants; . . . It is a right which devolves to the Crown, as parens patriae, and it is the duty of the Crown to see that the child is properly taken care of . . . I, therefore, have no doubt in the world, that it must be taken, to be a jurisdiction rightly assumed; . . .[3]

Whereas the earlier interpretation of parens patriae contained no reference to state interference with parental authority, the role of the crown as protector of those legal dependants was thus expanded to include intervention in parent-child relations. The primary criterion for state involvement appears to have been the welfare of the child.

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[1]Nicholas, "History," p. 153.

[2]37 Eng. Rep. 850 (1817).

[3]Wellesley v. Wellesley, 4 Eng. Rep. 1078, 1080-1081 (1828).

Gustav Schramm, past President of the National Council of Juvenile Court Judges, has defined this modification of parens patriae as now meaning ". . . that the juvenile court acting for the state, must to the extent of the default of the children's real parents, assume their parental responsibilities."[1] These responsibilities refer not only to the child's physical needs, but to his moral development as well.

Once the legitimate authority of the state to protect so-called "dependent children" was established through legal precedent, it was but a short step to view the parens patriae authority as sufficient to justify state action in the prevention of juvenile crime. This power would not be based on the principle of punishment for anti-social acts performed by responsible members of society, but would be founded on the notion that children were products of their environment and that their social responsibility was attenuated by their age. Anti-social behavior on the part of children came to be viewed not as criminal action, even though it might involve a violation of the law, but was interpreted as evidence that the child had been deprived of the necessary environment to cultivate proper social behavior patterns.

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[1]Gustav L. Schramm, "Philosophy of the Juvenile Court," The Annals, CCLXI (January, 1949), 105.

Just as the state, via parens patriae authority, could intervene between "unworthy" parents and their children, so could it act to halt a child's progress toward a criminal career as evidenced by his own behavior. In a sense, the state was protecting the child not only from his environment, but from himself as well. The Chicago Bar Association has stated this development succinctly:

> The fundamental idea . . . is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime. . . . /H/e may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state, to receive practically the care, custody and discipline that are accorded the neglected and dependent child, . . .[1]

This movement may be seen as a product of "criminological positivism."[2] Following the rejection of transcendental and metaphysical explanations of criminal behavior, the acceptance of anti-social action by juveniles as "caused behavior" was perhaps inevitable. Courts were to play a more positive role than merely doling out punishment to offenders. The juvenile offender, or delinquent as he came to be known, would be "helped" by the state.

This philosophical justification for the extension of the parens patriae authority into the area of juvenile

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[1]Timothy D. Hurley, Origin of the Illinois Juvenile Court Law (3rd ed.; Chicago, Illinois: The Visitation and Aid Society, 1907), p. 46.

[2]Paul W. Tappan, "Juridical and Administrative Approaches to Children with Problems," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 147.

delinquency was accompanied by a change in traditional court procedure. Very broadly this procedural modification resulted from the court's new role not as the arbiter of private strife but ". . . as the medium of the state's performance of its sovereign duties as parens patriae and promoter of the general welfare."[1] Something akin to the inquisitorial method of procedure began developing, and the courts abandoned many of the safeguards associated with Anglo-American criminal procedure.[2]

This innovative process in the courts was part of a much broader effort during the Nineteenth Century directed toward "child saving." Particularly during the waning decades of the century, broadly based social movements in the United States were directed toward the elimination of conditions believed to generate anti-social attitudes. This involved programs of slum clearance, enactment of humane factory laws, the ameolioration of prison conditions, and scores of related reform programs.[3] There seems to have been increasing acceptance by reformers in that period of

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[1]Edward F. Waite, "How Far Can Court Procedures be Socialized without Impairing Individual Rights?" in The Problem of Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), p. 303.

[2]These procedural innovations are discussed at greater length in later chapters.

[3]Graham E. Parker, "Some Historical Observations on the Juvenile Court," Criminal Law Quarterly, IX (July, 1967), 476-477.

the view that the state had a positive role to play in the shaping of human institutions for the betterment of society.

The optimism was such that writers openly expressed the opinion that the state, through the courts, was capable of shaping the attitudes of those appearing before it. Monrad Paulsen, then Professor of Law at Columbia Law School and noted leader in the juvenile court movement, believed:

> . . . that in the behavior sciences and the medical arts there was available a body of scientific information which, if applied to an erring child, could work beneficial change in him.[1]

So great was the impact of this approach on American court structures that some writers have referred to the developments as "revolutionary."[2]

In sum, juvenile courts seem to have their roots both in the legal tradition of English jurisprudence and the American social welfare movements of the Nineteenth Century. Although other elements have contributed to the development of a juvenile court system, the concepts of parens patriae and "social causation" provide the most widely accepted

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[1]Monrad G. Paulsen, "Kent v. United States: The Constitutional Context of Juvenile Court Cases," in The Supreme Court Review, ed. by Philip B. Kurland (Chicago, Illinois: The University of Chicago Press, 1966), p. 170.

[2]"Misapplication of the Parens Patriae Power in Delinquency Proceedings," Indiana Law Journal, XXIX (Spring, 1954), 476.

philosophical foundations. The acceptance in English courts of parens patriae arguments relating to chancery jurisdiction over the interests of children supplied the social reformer with legal precedents for their programs.[1] Those desiring to institute a new system of juvenile courts could thus claim that their program involved, for legal purposes, merely a change in degree, rather than of kind, in existing juridical practices. The "revolutionary" portion of this movement could be confined to the goals involved -- remaking the social consciousness of wayward youths. Social innovation and experimentation could be confined within the bounds of existing legal structures. From its inception, this marriage of a legal principle to a social reform movement was repeatedly subjected to serious stresses.

Although there seems to be general agreement among students of our juvenile courts that the parens patriae authority accounts for dependency jurisdiction, doubt is sometimes expressed regarding its use to justify special procedures in delinquency cases. Monrad Paulsen believes the parens patriae power developed only with respect to the protection of children from greedy adults or to assure

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[1]For cases illustrating such acceptance, see Eyre v. Shaftsbury, 24. Eng. Rep. 659 (1722) and In re Spence, 41 Eng. Rep. 937 (1847). For American cases, see In re Ferrier, 103 Ill. 367, 42 Am. R. 10 (1882), and Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905).

proper upbringing, but never to immunize from the consequences of criminal action.[1] Broadly, this view admits that the dependency and neglect jurisdiction of juvenile courts has strong roots in parens patriae but the extension of similar procedures into delinquency cases is considered a result of legislative policy rather than legal precedent.

Reacting to the prompting of social reformers who cared but little for legal niceties, American legislatures enacted statutes creating special institutions and procedures for dealing with juvenile delinquency. "Pettifogging lawyers" with their obscure objections were swept aside in a rush of social reformism. It was promised that children could not be held responsible for their environment which was a primary determinant of their behavior patterns. Thus, anti-social conduct on their part must not be treated as criminally inspired. Rather, the state has the responsibility to treat this much as a doctor treats an ill patient.

Although serious problems of both a constitutional and practical nature were likely to arise, advocates of juvenile courts were not deterred in their optimistic view of this merger between traditional legal institutions and innovative reform programs. Herbert Lou described juvenile courts as:

> . . . the first legal tribunal where law and science, especially the science of medicine and

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[1]Paulsen, "Kent v. United States," p. 173.

> those sciences which deal with human behavior, such as biology, sociology, and psychology, work side by side. It [the juvenile court] recognized the fact that the law unaided is incompetent to decide what is adequate treatment of delinquency and crime.[1]

Utilizing the formal legal structures of the state, scientists were free to use their expertise on the problem of eradicating the social maladies present in those individuals brought before the court. Criminal behavior henceforth would be viewed as a symptom of an underlying illness that needed to be treated. Judge Julian Mack, in a classic statement of juvenile court philosophy, has described the procedure:

> The problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.[2]

In this view, criminal courts direct their efforts to do something <u>to</u> someone for what he did, while juvenile courts try to do something <u>for</u> someone because of what he is and needs.[3]

Inherent in such a rationalization is the assumption that each person appearing before the juvenile court will receive "individualized justice," that his care and

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[1]Lou, <u>Juvenile Courts</u>, p. 2.

[2]Mack, "The Juvenile Court," pp. 119-120.

[3]For a discussion of the dangers inherent in such an approach, see Waite, "How Far," pp. 303-308.

"treatment" will be tailored specifically to him as an individual. The change involved is radical from some perspectives, but it may also be viewed as a matter of emphasis only and one having various precedents. As Gustav Schramm has pointed out, the use by juvenile courts of the concept of "individualized justice" does have some historical justification to the degree that courts of equity in Great Britain applied particularized justice for those cases, among others, where the application of the common law would be so harsh as to "shock the conscience of the King."[1]

A major tenet of the total juvenile court movement relates to the utilization of modern psychological and sociological probes to expose the needs of court clientele. If the juvenile court is to function in a manner described by its proponents, the use of well trained personnel in diagnosing and treating juvenile offenders and/or dependents is essential. Justification for the surrender of traditional procedural safeguards was rooted in the belief that the state would act in the best interest of the juveniles and carry out its implied promise to improve their welfare.[2]

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[1]Gustav L. Schramm, "The Juvenile Court Idea," Federal Probation, XIII (September, 1949), 20.

[2]For further discussion on this "bargain" to trade procedural protections for a beneficient "treatment" program, see: Ketcham, "Unfulfilled Promise," p. 26; Lou, Juvenile Courts, p. 10; Nicholas, "History," pp. 151-152; and Robert G. Caldwell, "The Juvenile Court: Its Development and Some Major Problems," Journal of Criminal Law, Criminology and Police Science, LI (January-February, 1961), 498-499.

Contingent to this promise was the availability to juvenile courts of sufficient staff and administrative aids.[1]

Some writers have referred to this emphasis in court procedure as "socialized justice."[2] If juvenile courts are to provide treatment tailored to the needs of the individual client, their authority to conduct investigations and inquiries into his habits and environment must be afforded considerable latitude. Causal factors of anti-social behavior can be uncovered only through a comprehensive examination of the individual's previous experiences. Without broad investigatory powers, treatment programs could not be founded on sufficient knowledge to achieve desired ends. Gustav Schramm has described this process as follows:

> The socialization of justice . . . not only looks for the common good but also seeks remedies, skills, and resources, outside of the courts which may be used in the fulfillment of these objectives. The word "socialization" takes on its traditional, semantic meaning of group participation as well as that of group use.[3]

The dual heritage of juvenile courts seems to have contributed to recent controversies over their proper role as an institutional facility to administer justice in the United States. In seeking a point of equilibrium between

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[1]For comment on availability of such aids, see Edward Eldefonso, Law Enforcement and the Youthful Offender: Juvenile Procedures (New York, New York: John Wiley and Sons, Inc., 1967), p. 166.

[2]Waite, "How Far," p. 303.

[3]Schramm, "Philosophy," p. 104.

their role as legal arms of the state and as institutions for encouraging moral reformation of wayward youths, the juvenile courts have been subjected to widely varying claims and counter-claims. While on the one hand Roscoe Pound audaciously once claimed that juvenile courts were the most important legal innovation since the Magna Carta,[1] other commentators have called for their abolishment for their alleged failure to accomplish their goals.[2] Those who would emphasize the need for protection of society have accused the courts of "coddling" juvenile criminals.[3] More "liberal" commentators have claimed that juveniles are all-too-often denied not only the procedural safeguards granted to hardened criminals, but once incarcerated also prevented from receiving even minimum physical needs.[4] Recent emphasis has been upon the extension of traditional legal safeguards to persons appearing before the juvenile courts.[5]

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[1]Roscoe Pound, "Guides for Juvenile Court Judges," National Probation and Parole Association Yearbook, 1957 (New York, New York: National Probation and Parole Association, 1957), p. 127.

[2]Olney, "Juvenile Courts," pp. 1-6.

[3]J. Edgar Hoover, (letter to editor), American Bar Association Journal, IL (June, 1963), 561-562.

[4]J. W. Anderson, "A Special Hell for Children in Washington," Harper's Magazine, CCXXXI (November, 1965), 51-56.

[5]For a review of the changes in juvenile court philosophy, see Orman W. Ketcham, "The Changing Philosophy of the Juvenile Justice System," Juvenile Court Judges Journal, XX (Summer, 1969), 59-63.

Goals

The years immediately before and after the turn of the century are regarded as the period of maximum activity for juvenile court reformers. Their initial victories were achieved then and the groundwork for future developments was laid. Prior to an examination of the events involved in the establishment of the first courts it will be useful to inquire into the goals or purposes of the reformers responsible for this new approach.

From a negative stance juvenile courts had as one of their goals the elimination of court-directed punishment as a means of discouraging anti-social behavior by juveniles. Proponents of these new courts set forth the substitute notion of using an arm of the state as a device to reach what were then considered the root causes of delinquency. Juvenile courts, it was argued, would go beyond treatment of the symptoms of social maladjustment in children and move to cure the causes of the illness. By using this curative device, a major problem facing society could drastically be reduced if not eliminated. As one student of juvenile justice stated:

> The first juvenile-court law passed in 1899. . . . At that time little was known about the causes of delinquency and, in consequence, little about treatment or prevention. It was believed that if children were separated from adult offenders and the judge dealt with the problems of "erring

> children" as a "wise and kind father" . . . wayward tendencies would be checked and delinquency and crime prevented or reduced. . . . The challenging and seminal idea which was back of the juvenile court was that its function was to cure, rather than to punish, delinquency -- a very much more difficult task.[1]

Children in a state of dependency or neglect would receive similar care and treatment as their condition was equally restrictive to the development of useful productive citizens.

Timothy Hurley, author of a 1904 history of the first juvenile court law, expressed the naive optimism present in much of the writing of that period:

> . . . [T]he foundation idea of the Juvenile Court Law in providing for the care of the dependent or delinquent child is not an idea of punishment for crime or mendicancy, for the law does away entirely with all idea of crime or beggary as applied to a child. The work of the court is to inquire into the causes of the dependency or delinquency, to find out why the child went wrong in the first place, to remove the cause of the fall from grace, and to start the little one on the right road.[2]

The causes of delinquent behavior were viewed primarily on a personal basis rather than as embedded in the socio-economic fabric of the entire society. Hurley described the method of dealing with the causes of delinquency as follows:

> It was intended that the court should search out and remove the primary causes of the deflection

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[1]Abbott, The Child, pp. 331-332.

[2]Timothy D. Hurley, Juvenile Courts and What They Have Accomplished (2nd ed.; Chicago, Illinois: The Visitation and Aid Society, 1904), p. 14.

> from the paths of rectitude. Perhaps the cause is found to lie with the parents of the child, who treat him so cruelly and make the home life so unpleasant that, in sheer self-defense, he runs away. Following the natural order of things, because vice is always pictured to the child by his vicious companions as something very beautiful, the little thing naturally runs after what appears to be bright and alluring to his eyes. He is unprotected because there is no wise, guiding hand to turn him back into the "straight and narrow way," and no voice to warn him that the shining thing which looks so red and luscious is only a dead sea-apple that will turn to ashes in his hand.[1]

Protection against such undesirable familial and peer group influences were to be provided by the state as parens patriae. Judge Julian Mack has described the role of the state as "protector" of children, not their enemy.[2] Other writers of a more recent period have expressed similar views concerning juvenile court purposes.[3]

Doubts about the ability of juvenile courts to accomplish all or even a substantial portion of what was claimed for them have cast a shadow over the unbridled optimism of past decades. As the complexities of psychological and sociological interrelationships have become more evident in recent years, the challenges to simplistic answers to social problems have increased in intensity and

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[1] Ibid., p. 12.

[2] Mack, "The Juvenile Court," p. 107.

[3] See Solon L. Perrin, "The Future of the Children's Court," American Bar Association Journal, VIII (December, 1922), 767-769, and Walter H. Beckham, "Do You Understand Juvenile Courts?" American Bar Association Journal, XLIII (August, 1957), 703-705.

volume. Empirical studies of court operations have found gaps between theoretical goals and actual achievements.[1] Too much, it seems, was expected of juvenile courts.[2] Their goals were simply beyond achievement, given the nature of the problem and the available resources.

Although more modest goals have replaced the somewhat visionary hopes of the early reformers, supporters of the juvenile courts maintain their belief in the usefulness of their special procedures. Paul Alexander, past President of the National Council of Juvenile Court Judges, has described the purpose of juvenile courts as extending beyond the administration of justice to children to protect their "supraconstitutional rights" such as adequate social, economic, physical, mental and ethical treatment.[3] Dade County Florida juvenile court judge Walter Beckham has argued that the courts must have a wide discretion in determining what is best for the child.[4]

Contemporary advocates of a strong flexible juvenile court thus tend to reject the view that the institution is incapable of achieving its goal of rehabilitation of

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[1]See Sheldon Glueck and Eleanor T. Glueck, One Thousand Juvenile Delinquents (New York, New York: Kraus Reprint Corporation, 1965).

[2]See Abbott, The Child, p. 335.

[3]Paul W. Alexander, "Constitutional Rights in Juvenile Court," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glencoe, 1962), p. 90.

[4]Beckham, "Do You Understand," p. 703.

potential criminals. Past failures, as indicated by high rates of recidivism, may be explained by pointing to inadequate resources, training, and personnel in the courts. While it may be admitted by court proponents that writers at the turn of the century were overly optimistic, this concession does not weaken their position that juvenile courts are a far better alternative method of dealing with delinquency than are the criminal courts and prisons. With sufficient resources juvenile courts can, its supporters argue, play a significant role in the rehabilitation of youthful offenders. In sum, while the basic purpose remains the remaking of delinquent children into socially responsible individuals, most observers now agree that juvenile courts cannot by themselves perform the miracle of eradicating delinquency.

Opposing delinquency and the causes of it is very much like supporting good against evil: agreement as to goals is universal, but finding widely acceptable methods is a more elusive endeavor. Although the institution of juvenile courts seems secure in the American legal structure, recent efforts to find its role for optimum achievement have created problems both of a practical and a constitutional nature that are having a profound effect upon the manner in which delinquency, dependency, and neglect are combatted.

Establishment of First Courts

Legal institutions seldom spring full grown from the legislative hopper free from previous past forays in the field by progressive reformers. More often, the circumstances surrounding new legislative creations are filled with bits and pieces of earlier attempts to initiate similar action. With regard to juvenile courts, Herbert Lou noted:

> The various steps which led to the creation of the juvenile court began in the first half of the nineteenth century. The idea of certain features of a juvenile court, such as that of separate confinement, separate hearings, and probation, had been influencing American jurisprudence for many years prior to the advent of the juvenile court.[1]

Early efforts in the movement to provide a special set of rules and procedures for dealing with children brought before the bench were confined to post-conviction treatment. Many observers of the juvenile court system in the United States have pointed out that the first known instance of such a program was the House of Refuge established in New York in 1825.[2] This institution, and one in Boston created a year later, was designed primarily as a prison

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[1]Lou, Juvenile Courts, p. 15.

[2]Bloch and Flynn, Delinquency, p. 309, Glueck and Glueck, One Thousand Juvenile Delinquents, p. 9, Caldwell, "The Juvenile Court," p. 494, and Margaret K. Rosenheim, Perennial Problems in the Juvenile Court," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p.2.

for juveniles to segregate them from adult offenders. Rehabilitation programs, as they are currently understood, were not a part of these juvenile penitentiary programs.

In 1847 Massachusetts established for the first state reform school and in 1864 provided for a "visiting agent" who attended hearings upon applications for commitment of children to reformatories, and helped place out children to families if the judge though it useful.[1] This official sanction of what would now be called probation for juveniles was a major step in the direction of treatment programs for wards of the court.

New York in 1853 provided for the placement of wards of the court in foster homes utilizing the facilities of the Children's Aid Society.[2] The Society for the Prevention of Cruelty to Children devoted much of its effort to referring "pre-delinquents," i.e., dependent and neglected children, to the courts for possible foster home placement.[3]

As can be seen, these early Nineteenth Century efforts to modify state action with respect to delinquent, dependent, and neglected children were confined to the post-conviction stage of the procedure. It was not until 1863

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[1]Bloch and Flynn, Delinquency, p. 309.

[2]Caldwell, "The Juvenile Court," p. 494.

[3]Rosenheim, "Perennial Problems," p. 5.

that any of the states required separate trial sessions for juveniles.[1]

In the latter decades of the century the movement supporting the complete separation of procedures for dealing with children in need of care was intensified. The pre-conviction process was scrutinized and found to be lacking, not only in the humanitarian virtue of kindness, but also in the ability to use modern scientific methods of understanding and treating causes of anti-social behavior. Technical legalisms only hindered the search for the truth as it related to the behavior of juveniles, argued proponents for change in court procedures. In order to achieve success in the post-conviction treatment programs, the pre-conviction process must permit an examination of the "whole personality," going beyond an examination of the merely symptomatic behavior itself. Only a special kind of court equipped with modern research methods could carry out this program of investigation. With these goals in mind, reformers shifted their focus for a time to the adjudication process itself.[2]

Illinois began to modify its methods for dealing with delinquent, dependent, and neglect children in 1861 with an act empowering the mayor of Chicago to appoint a commissioner

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[1]Katherine F. Lenroot, "The Evolution of the Juvenile Court," The Annals, CV (January, 1923), 213.

[2]Ibid., pp. 213-214.

before whom boys between six and seventeen could be brought on charges of petty offenses.[1] In 1867 the duties of the Chicago commissioner were transferred to judges at the superior or circuit court level.[2] The Illinois legislature returned to the problems of post-conviction treatment in 1879 with the establishment of an Industrial School for Girls whose purpose was:

> . . . to provide a home and proper training school for such girls as may be committed to their charge; as they shall be maintained by voluntary contributions, excepting as hereinafter provided.[3]

It was further provided that a resident of any county in Illinois could petition the county court to inquire into the alleged dependency of any female infant then within the county. The court could then declare the girl dependent if she, among other things, begged, received alms, had no permanent place of abode, or did not receive proper care.[4] That a finding of dependency had some close relation to criminal proceedings is made clear in the fact that a jury

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[1] Private Laws of Illinois (1861), p. 149. Much of the material utilized in this section dealing with the developments in Illinois surrounding the first juvenile court law was taken from Hurley, Origin. For additional reading into the Illinois experience, see Lou, Juvenile Courts, pp. 1-20, Eldefonso, Law Enforcement, pp. 159-163, and U.S., Department of Labor, Children's Bureau, The Chicago Juvenile Court by Helen R. Jeter, Pubn. No. 104 (Washington, D.C.: Government Printing Office, 1922).

[2] Private Laws of Illinois (1867), pp. 31-32.

[3] Laws of Illinois (1879), p. 309.

[4] Ibid., pp. 309-310.

of six was to decide the issue and in the requirement that counsel be provided those girls who had none. A similar statute for boys was passed in 1883.[1]

Timothy Hurley has pointed out a fundamental weakness of the industrial and manual training school laws, as they were known, in that they did little to aid the great mass of neglected, dependent, and delinquent children in Illinois.[2] The first known concrete step toward enactment of a more broadly applicable juvenile court act was initiated by a member of the Illinois Board of State Commissioners of Public Charities, Ephraim Banning. At the 1898 annual meeting of the Chicago Bar Association, he introduced a resolution providing for the appointment of a committee to begin work on securing desired changes in the existing law. The purpose of the five man committee was as follows:

> . . . [T]o investigate existing conditions relative to delinquent and dependent children, and to cooperate with committees of other organizations in formulating and securing such legislation as may be necessary to cure existing evils and bring the State of Illinois and the City of Chicago up to the standard of the leading states and cities of the union.[3]

During the course of several meetings of the committee a proposed bill was drawn up. State Representative John Newcomer introduced the measure in the Illinois House of

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[1] Laws of Illinois (1883), p. 168.

[2] Hurley, Origin, p. 13.

[3] Ibid., p. 16.

Representatives on February 7, 1899. An identical bill was introduced in the Illinois Senate on February 15, 1899. Following joint committee hearings, the House unanimously passed the juvenile court statute on April 14, 1899.[1] The Senate had approved the bill on March 23, 1899 with but one dissenting vote.[2] The nation's first juvenile court law became effective on July 1, 1899.

This new statute providing for a juvenile court in Illinois was entitled "An Act to regulate the treatment and control of dependent, neglected and delinquent children."[3] Its application was limited to children under sixteen years of age not inmates of a state institution. Section 1 defined the categories of children subject to the jurisdiction of the court as follows:

> . . . [T]he words . . . dependent and neglected child shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable persons; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any

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[1]Illinois, General Assembly, House of Representatives, Journal of the House of Representatives of the Forty-First Illinois General Assembly 1899 (Springfield, Illinois: State of Illinois, 1899), p. 864.

[2]Illinois, General Assembly, Senate, Journal of the Senate of the Forty-First Illinois General Assembly 1899 (Springfield, Illinois: State of Illinois, 1899), p. 366.

[3]Laws of Illinois (1899), p. 131.

> child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.[1]

Other provisions defined delinquency as consisting of violations of state laws or city ordinances. As will be seen, this definition of delinquency was subsequently expanded to include various other actions.

All counties in Illinois came under the provisions of the act, which provided that circuit and county courts were to have original jurisdiction in all cases coming within the terms of the act. In those counties with over 500,000 in population, namely Cook County alone, there was envisioned the designation from the circuit court judges of one of their number to hear all cases coming under this act. Judge Richard S. Tuthill was designated the first juvenile court judge of Cook County. This new court was a division of the circuit court and, as elsewhere in the state, was not separate from the basic court system. Integration of the juvenile court into the existing court structure was essential under the existing Illinois Constitution of 1870 which failed to provide for the legislative creation of specialized courts denying existing ones of their jurisdiction.[2]

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[1] Ibid., pp. 131-132.

[2] Illinois, Constitution (1870), art. VI (original judicial article).

Proceedings could be initiated by any reputable resident of a county in Illinois by filing with the clerk of the circuit court a written petition setting forth the facts, verified by affidavit, of the alleged dependency, delinquency, or neglect. This court would, when hearing cases under the new law, be transformed into a juvenile court operating with a different set of rules than those applicable in criminal or civil proceedings. The judge would now be a juvenile court judge even though in all other instances he was a circuit or county court judge.

Protection of parental rights[1] was provided for in Section 5 of the law which required that they be notified of the proceedings.[2] This was an essential part of the process for the reason that without such notice the whole action of the court might be vitiated in a subsequent challenge to the proceedings. Although no detailed description of the method of notification was given, a written summons was to be the form of notice. A 1905 amendment added the following provisions:

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[1]Such words as "rights" and "privileges" used herein take their meaning from Hohfeldian terminology. See Wesley N. Hohfeld, "Fundamental Legal Conceptions," Yale Law Journal, XXIII (1913-1914), 16-59, Wesley N. Hohfeld, "Fundamental Legal Concepts as Applied in Judicial Reasoning," Yale Law Journal, XXVI (June, 1917), 710-770, and Walter W. Cook, "Hohfeld's Contributions to the Science of Law," Yale Law Journal, XXVIII (June, 1919), 721-738.

[2]Laws of Illinois (1899), p. 132.

> Summons and notice may be served by the sheriff or by any duly appointed probation officer, either by reading the same to the person or persons to be served or by delivering a copy thereof to such person or by leaving a copy thereof at his usual place of abode . . .[1]

There was no requirement that the judge inform persons appearing before the juvenile court of their right to representation by counsel or other procedural guarantees as set forth in the Illinois and United States Constitution. At the hearing the judge was to hear and dispose of the case in a "summary manner."[2] No other description of the proceeding was given. Apparently the juvenile court judge and the probation officer, if one had been appointed, were to protect the interests of the child during the proceeding. Rigid rules of procedure were completely absent from the legal description of this new institution.

The statute was framed to avoid treating the child as a criminal, and to this end labels associated with criminal proceedings such as "indictment" and "warrant" were replaced by "petition" and "summons" respectively.[3] There was, however, provision for a jury trial on demand of any "interested person" included in the law.[4] This was probably included to meet future constitutional challenges to

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[1] Laws of Illinois (1905), p. 154.

[2] Laws of Illinois (1899), p. 133.

[3] Ibid., pp. 132-133.

[4] Ibid., p. 132.

the law under Section 5 of Article II of the Illinois Constitution of 1870 and was not intended to be a regular feature of juvenile court proceedings. This provision was maintained until the 1965 statute revision.

Timothy Hurley has summarized the reasons for describing the Illinois juvenile court as non-criminal:

> When the child is brought into the court the inquiry is with reference to the condition of the child. Is there a condition of dependency or a condition of delinquency? Instead of a "prosecutor" there is a "probation officer" who is there, not to "convict" the child but to "represent his interests." Instead of a jury of twelve men, there is a jury of six men or no jury at all. The child is not "convicted" but is "found dependent" or "found delinquent." The child is not "sentenced" to a reformatory or prison, but is "committed" to the care of a probation officer or to the care of a friendly institution. The proceedings in court are informal. The strict rules of evidence are not adhered to. The effort is: first, to find out what is the best thing to be done for the child; and second, if possible, to do it.[1]

Only the future could discern whether these changes were real and beneficial, or if they were mere euphemisms stripping the juvenile of his constitutional rights while offering no substantive benefits in return.

In order to carry out the purposes of the act the courts were given authority to appoint, without pay, probation officers who were to make investigations into cases before the court and to represent the interests of the child

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[1]Hurley, Juvenile Courts, p. 76. See also Lou, Juvenile Courts, p. 20 for his analysis of the non-criminal nature of juvenile courts in Illinois.

when the hearing took place.[1] After the proceedings were concluded the probation officer would, at the direction of the court, take charge of the child and provide "friendly supervision."[2] If the court declared the juvenile to be delinquent, that is having been found "guilty" of a criminal offense, he could be committed to either an institution specifically designed for delinquent children, or, if over ten years old, to the state reformatory for a period not to exceed his minority.[3] Such commitments were theoretically not designed to punish the offender but rather to help him by using the guiding hand of the state. It was apparently recognized by the authors of the legislation that the kind of "help" needed by delinquents was of a different kind than required by dependent and neglected children. Reference to the state reformatory was made in that portion of the law dealing with the disposition of delinquent children, while the provision for dependent and neglected children contained no such mention of reformatories as a treatment program.

The original Illinois law, in comparison to later statutes, was somewhat narrow in its application. Proponents of an expanded role for the new court raised questions about the restrictive limitation of delinquency, under

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[1] Laws of Illinois (1899), p. 134.

[2] Ibid.

[3] Ibid.

which violation of a statute or ordinance was the test. They were soon successful in achieving statutory expansion of the term in a 1901 amendment to the law.[1] The definition of delinquency was changed to include not only juveniles who violated the law but also those who were "incorrigible." A further enlargement of the term occurred with a 1905 amendment to the law which included such actions as leaving home; frequenting saloons, dram shops, or pool halls; wandering the streets at night; using vile, obscene, vulgar, profane, or indecent language; and living in an immoral manner.[2] As one writer commented, the Illinois law was extended to include all children whose conduct did not conform to a model of wholesome youthful activity.[3] A vertical expansion of the law took place in 1905 when the upper age limit for boys was extended to seventeen years and for girls to eighteen years.[4]

Further refinements in the juvenile court law of Illinois included a professionalization of probation officers. In 1905 the legislature passed an act providing for the payment of salaries to probation officers in

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[1] Laws of Illinois (1901), pp. 141-142.

[2] Laws of Illinois (1905), p. 153.

[3] Rosenheim, "Perennial Problems," p. 9.

[4] Laws of Illinois (1905), p. 152.

counties over 500,000 in population.[1] Two years later provision for a salaried probation officer for other counties was included in the law.[2]

Although during the ensuing years many amendments to the original law were placed on the statutes, there were no fundamental changes enacted until 1949, when the family court concept was accepted in Illinois.[3] This was followed in 1965 with a complete revision of the juvenile court law.[4] The 1899 statute, accordingly, constituted the framework of juvenile justice in Illinois for almost fifty years.

Following the enactment in Illinois, similar statutes were written in various other states in very short order. Within five years, eleven additional states had passed legislation creating juvenile courts.[5] By 1914 thirty states had acted, and by 1927 all forty-eight states excepting Wyoming and Maine had a juvenile court system.[6] Wyoming was the last state to join the movement in 1945.[7]

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[1] Ibid., pp. 151-152.

[2] Laws of Illinois (1907), pp. 69-70.

[3] Ill. Rev. Stat. (1949), c. 23, sec. 190.

[4] Ill. Rev. Stat. (1965), c. 37, sec. 701-1.

[5] Eldefonso, Law Enforcement, p. 162.

[6] Lou, Juvenile Courts, p. 24.

[7] Eldefonso, Law Enforcement, p. 162.

Federal legislation on this subject was delayed until 1932[1] when an act providing for the transfer of certain juvenile offenders to state jurisdiction was passed.[2] In 1938 this was amended to the effect that a special processing of juveniles could, with approval from the Attorney General's office, be instituted in federal courts.[3] Similar to the Illinois law, the federal statute provided few specific court procedures except that the juvenile's consent in writing be obtained before the juvenile hearing could commence and that he be advised of his rights.

All of the fifty states and the federal government now have some provision for juvenile courts.[4] The first formative years were followed by a prolonged period of relative calm in so far as legal and constitutional challenges were

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[1]For a discussion of the pre-1932 period in federal proceedings against juveniles, see Abbott, The Child, pp. 429-430.

[2]47 U.S. Stat. (1932), p. 301.

[3]52 U.S. Stat. (1938), p. 765.

[4]For a concise summary of selected provisions of the various juvenile court statutes, see the following: Juvenile Court System Summaries for All States of the United States, the District of Columbia and Puerto Rico (Chicago, Illinois: National Council of Juvenile Court Judges, 1964), Juvenile Court Judges Directory and Manual (Chicago, Illinois: National Council of Juvenile Court Judges, 1963), pp. 306-337, and Frederick B. Sussmann and Frederick S. Baum, Law of Juvenile Delinquency (3rd ed. rev., Legal Almanac Series No. 22; Dobbs Ferry, New York: Oceana Publocations, 1968).

concerned. Vigorous questioning of juvenile court foundations was deferred until mid-century with the attention that then was given by the Supreme Court under Chief Justice Earl Warren to individual freedoms and rights. These questions developed after the juvenile courts had been in operation for five decades, a period sufficient for evaluation and reassessment.

CHAPTER II

PRE-GAULT TRENDS AND ISSUES

The comprehensive revisions of the Illinois juvenile court act in the 1960's, comparable to variably dated changes in other states, and the foundation shaking decision of the U.S. Supreme Court in the 1967 In re Gault[1] case may all be properly viewed as the culmination of decades of experience with juvenile court practices. Moreover, it appears that juvenile court procedures were never entirely static, so that trends and issues evident in the pre-1967 period require rather detailed attention if the decision in the Gault case is to be fully appreciated.

Participants and Their Roles

Juvenile court procedures can be analyzed by adopting a three stage perspective; that is to see the process as involving intake, hearings, and disposition. This is, of course, merely a modification of the terms input, decision making, and output as used in systems analysis. In each of the steps involved there are functioning structures with defined roles that require explanation if the process is to be understood.

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[1] 387 U.S. 1 (1967).

Referrals to juvenile courts are most frequently initiated by members of the police force in a given jurisdiction. One author reports that 98 per cent of delinquency cases result from police referrals.[1] The officer must decide whether an official action or an unofficial solution would be more appropriate. Conceivably this could involve a reprimand given the juvenile and/or completely unofficial, that is unauthorized, probation in the sense that the police officer keeps his eye on the juvenile in question. The lack of clear guidelines available to enforcement officials has been criticized as permitting arbitrary discretion by the police.[2] Chicago police are given six criteria on which to base their judgment in cases of possible court referral: (1) the seriousness of the offense; (2) previous behavioral history of the juvenile; (3) environmental factors; (4) attitude of the complainant; (5) attitude of the parents; and (6) community resources.[3] This major referral source thus apparently operates with very elastic rules of procedure as to which cases require court action and which ones do not.

If referral to the juvenile court is the choice made, an intake procedure which commonly emphasizes informal

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[1]Joel F. Handler and Margaret K. Rosenheim, "Privacy in Welfare: Public Assistance and Juvenile Justice," Law and Contemporary Problems, XXXI (Spring, 1966), 395.

[2]Ibid., p. 409.

[3]Ibid., pp. 397-398.

disposition rather than a formal hearing before the judge is the rule. That is, efforts are made to dispose of the bulk of the referrals without the actual filing of a petition in the nature of a complaint and the steps that would then normally take place. Instead, the judge or some other functionary of the court disposes of the matter. The Children's Bureau of the U.S. Department of Health, Education, and Welfare reported that in 1966 over half of the delinquency cases were handled nonjudicially, that is, before the filing of a petition.[1] Most states, including Illinois under its 1965 juvenile court act,[2] make provision by law or in practice for a preliminary hearing prior to the filing of a petition.[3]

Such informal adjudication has been criticized for contributing to the lack of preciseness of juvenile court authority and function.[4] It has been argued, on the other

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[1]U.S., Department of Health, Education, and Welfare, Children's Bureau, Juvenile Court Statistics 1966, (Statistical Series No. 90; Washington, D.C.: Government Printing Office, 1966), p. 4. Hereafter this source will be cited as follows: Juvenile Court Statistics 1966.

[2]Ill. Rev. Stat. (1969), c. 37, sec. 703-8.

[3]Frederick B. Sussmann, Law of Juvenile Delinquency (2nd ed. rev., Legal Almanac Series, No. 22; Dobbs Ferry, New York: Oceana Publications, 1959), p. 31.

[4]For example, see Paul W. Tappan, "Juridical and Administrative Approaches to Children with Problems," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 157, and Paul W. Tappan, "Unofficial Delinquency," in The Problem of Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), pp. 296-303.

hand, that without specialized intake services to dispose of a large portion of the cases, the court would be overworked and unable to perform its functions properly.[1]

Once the petition has been filed, a summons is ordinarily issued by the probation officer requiring the child and parents or guardian to be in court at a specified time. The hearing which then takes place may or may not be preceeded by a diagnostic social investigation. As will be noted more fully at a later point, recent trends in court procedure have been toward the postponement of the social investigation until a finding of delinquency, dependency, or neglect is made. The analysis of the juvenile's problem and outlining of a recommended treatment program is, in the ideal situation at least, made by a properly trained staff aide of the court.[2] The judge is free to adopt its recommendations, amend them, or reject them entirely. It may be noted, however, that in a recent study of the California system of juvenile justice, the frequency of disagreement between juvenile court judges and their probation officers

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[1]Paul W. Keve, "Administration of Juvenile Court Services," in Justice for the Child, ed by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), pp. 188-190.

[2]See Herbert A. Bloch and Frank T. Flynn, Delinquency: The Juvenile Offender in America Today (New York, New York: Random House, 1956), p. 364, and Sarah T. Hughes, "Trial of Juvenile Delinquents in Federal Courts," in Law Enforcement and the Juvenile Offender (Springfield, Illinois: Charles C. Thomas, Publisher, 1963), p. 86.

as to required treatment was very small.[1] Although exceptions undoubtedly exist, the rapport between juvenile court judges and their probation staff, as to treatment programs, is quite probably high throughout the United States.

Once jurisdiction has been established, primarily through a verification of age plus the filing of a complaint with the intake services, and after the parties have been notified, the formal hearing takes place. Initially the purpose of the court is to determine if the facts in the case support a declaration of delinquency, dependency, or neglect. However, factual questions in delinquency cases are rarely in dispute, as Grace Abbott has observed:

> The question before the court is, what should it do for a boy who has been stealing, staying out all night, or who is troublesome or a truant at school. . . . A small percentage of the cases involve decisions as to the custody of children, commitment against the wishes of the parents and the juvenile to an institution or a foster-home, and present an "issue" for the judge to settle.[2]

This contention is supported by the findings of the California study in 1960.[3]

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[1]California, Governor, Report of the Governor's Special Study Commission on Juvenile Justice, Part II (Sacramento, California: Printing Division - - Documents Section, 1960), p. 24. Hereafter this source will be cited as follows: Cal. Gov. Comm. Report.

[2]Grace Abbott, ed., The Child and the State II (Chicago, Illinois: University of Chicago Press, 1938), p. 336.

[3]Cal. Gov. Comm. Report Pt. II, p. 8.

There can, of course, be considerable speculation as to just why controversy over the alleged facts is relatively rare in delinquency cases. In some instances the proof available is so clear that denial seems futile. In other instances, however, the explanation may be non-appreciation of rights as to the burden of proof and rules of evidence. For example, hearsay evidence and non-confrontation by witnesses appear to be quite common elements that only in recent years are being specifically legislated against.[1]

Before an examination of the formal hearing process is presented, it should be recalled that the theoretical foundations of juvenile courts rest on the assumption that the process is essentially non-criminal in nature. Recent findings[2] have damaged this assumption beyond repair, but in the past this assumed non-criminal basis of the proceeding colored most aspects of the hearing. To illustrate, many states excluded the general public on the basis of protecting juveniles from the stigma of public knowledge of his

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[1]For example, see Ill. Rev. Stat. (1969), c. 37, sec. 704-6 and sec. 705-1 which provide for two separate hearings: adjudication of status and court disposition. Evidence admissible into the latter may be inadmissible into the former.

[2]The following studies are examples of the comments on the punitive aspects of juvenile court dispositions: James Howard, "Children in Trouble: A National Scandal," Christian Science Monitor, March 31, 1969, sec. 2, pp. 13-14, (This was the first of a series of fifteen weekly articles.) and William J. Linklater and Robert J. Zana, "Constitutional Law - Due Process - Juvenile Courts: Specific Due Process Guarantees Extended to Accused Delinquents in State Juvenile Court Proceedings," Illinois Bar Journal, LVI (December, 1967), 320.

delinquency.[1] Herbert Lou has stated the case for the proponents of private hearings most adequately:

> Public hearing cannot be claimed as a constitutional right. There is no constitutional right to a public hearing on the part of the child when the case is not a prosecution for crime, especially when the issue is dependency or neglect or in the matter of guardianship. Nor is there any right on the part of the public to attend a court hearing in which it has no direct interest.[2]

Within this private hearing the judge has played by far the most prominent part, going well beyond his traditional activity as a passive arbiter of disputes. One writer described his role as follows:

> . . . [T]he judge . . . frequently not only "presents the case" but must intervene to take over the questioning of the "defendant" or witnesses when the probation officer falters. At the same time, because the court is charged with protecting the interests of the child, the judge may preempt or intervene in the role of the defense attorney if one is not present.[3]

At this quasi-inquisitorial hearing the juvenile court judge, to the dismay of some observers,[4] may take on the mantle of psychologist, sociologist, and, in general, social

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[1]Sussmann, Law, p. 32.

[2]Herbert H. Lou, Juvenile Courts in the United States (Chapel Hill, North Carolina: University of North Carolina Press, 1927), p. 132.

[3]Edwin M. Lemert, "Legislating Change in the Juvenile Court," Wisconsin Law Review, 1967 (Spring, 1967), 434-435.

[4]Harry L. Eastman, "The Juvenile Court Judge's Job," National Probation and Parole Association Journal, V (October, 1959), 414-422.

scientist. One juvenile court judge went so far as to claim that because of the unique purposes attached to juvenile courts, the judge was not presiding over a court of law but was a judge in a court of human relations.[1] Questions about the ability of some juvenile court judges to handle such a myriad of responsibilities have arisen from recent studies which indicate that one-quarter of the judges have no legal education whatsoever, that one-half have no college degree, and that one-fifth have no college education at all.[2]

Paternalism perhaps best describes the relaxed procedural requirements in juvenile courts. Statutes frequently require that the hearings be conducted at a time and place separate from that of criminal court and indicate that the system of juvenile justice is not to be bound by the technical rules of procedure applicable elsewhere in the adult court structure.[3] Orman Ketcham, juvenile court judge in Washington, D.C., has described the customary juvenile court procedure as follows:

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[1]Walter H. Beckham, "Helpful Practices in Juvenile Court Hearings," Federal Probation, XIII (June, 1949), 10-14.

[2]Judges Look at Themselves: Profile of the Nation's Juvenile Court Judges (Chicago, Illinois: National Council of Juvenile Court Judges, 1965), pp. 5-7. These are overlapping figures.

[3]Sussmann, Law, p. 32.

> The result [of applying *parens patriae* concepts to delinquency hearings] has been that -- along with the concepts of retribution, punishment, and deterence -- the standard rules of criminal procedure (e.g., right to jury trial, protection against self-incrimination, open hearings, proof beyond a reasonable doubt, right to counsel, limitations upon the use of hearsay evidence, and right to bail) have generally been discarded in American juvenile courts.[1]

In terms of specific actions, the hearing often takes place in the judge's chambers with only those persons directly involved being present, including perhaps the probation officer, the juvenile and his parents.[2] Following a statement by the probation officer or other interested party called by the court, the judge attempts to determine the facts at issue. If the youth is declared delinquent, dependent, or neglected, a disposition may be handed down immediately or may be postponed until a later date.

During the hearing an attorney may be present to represent the child and his parents, although until recently this practice was uncommon in the great majority of cases.[3]

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[1]Orman W. Ketcham, "The Unfulfilled Promise of the American Juvenile Court," in *Justice for the Child*, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 25.

[2]For additional comment on the hearing process, see Frank W. Nicholas, "History, Philosophy, and Procedures of Juvenile Courts," *Journal of Family Law*, I (Spring, 1961), 163-165.

[3]David R. Barrett, William J. T. Brown, and John M. Cramer, "Notes - Juvenile Delinquents: The Police, State Courts, and Individualized Justice," *Harvard Law Review*, LXXIX (February, 1966), 796.

Prior to 1960 many individuals appearing before juvenile courts were not informed by the court or its staff of their right to legal representation.[1] Because the proceeding was viewed as non-criminal and non-adversary, the presence of an attorney was frequently viewed as unnecessary if not undesirable. A former juvenile court judge in Tuscon, Arizona wrote:

> . . . [T]he writer does not believe that there is much to be gained by any insistence upon legal counsel in juvenile court. Lawyers are so indoctrinated in the adversary procedure and philosophy that the writer believes that for the most part it will be impossible for them to take an active part in a juvenile court hearing without destroying to some extent the non-adversary procedure and philosophy thereof.[2]

He goes on to say, however, that their <u>right</u> to represent a juvenile should not be impaired. Opponents of regular appearances by lawyers in juvenile court are concerned that such efforts will be directed toward "beating the rap" for the client rather than accepting juvenile court philosophy of finding a suitable treatment program.

The disposition of delinquency cases frequently involves probation under the guidance of a probation officer.

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[1]The 1960 California study indicated that only twenty-one of the fifty-seven juvenile court judges responding to the questionnaire indicated that they regularly advised minors and/or their parents of the right to representation by counsel in juvenile court. Cal. Gov. Comm. <u>Report</u> Pt. II, p. 12.

[2]John J. Molloy, "Juvenile Court - A Labyrinth of Confusion for the Lawyer," <u>Arizona Law Review</u>, IV (Fall, 1962), 23.

Other possible court decisions are dismissal, commitment to training school, or foster home placement. In some instances restitution of property taken or reparation for damages may be required, even though specific statutory provision authorizing such a requirement may be absent from the statute governing the particular juvenile court.[1] Although not technically a disposition, the device of a continuance is sometimes used to avoid the label of delinquent and at the same time to continue court supervision of the youth.

In those instances where a finding of delinquency constitutes the judgment of the court, probation is the most common disposition.[2] Basically probation is a suspension of "sentence" against a delinquent subject to good behavior. This status involves limitations on freedom of action and, often, periodic contacts with the officer in charge. The period of probation may be for a specifically stated time or indefinite, until the child reaches his majority or the probation officer recommends to the court that supervision is no longer required. This is in line with juvenile court theory of seeking to discover the causes of social maladjustment and then treating those causes. No arbitrary

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[1] Sussmann, Law, p. 45.

[2] Ibid., p. 47. See also Cal. Gov. Comm. Report Pt. II, p. 19.

length of time can rationally be set for this process, which varies from case to case.

Primarily because of doubts about the so-called non-punitive nature of juvenile court dispositions, there has developed a group of writers who challenge the non-criminal description of the system of juvenile justice in the United States. Monrad Paulsen, a prolific writer in the area of juvenile justice, was once a staunch believer in the traditional view of juvenile courts. He has, however, changed his mind and indicated his conviction that punishment may in fact be the motivating force in court dispositions.[1] Other commentators have labeled court dispositions as "punitive" because of the frequency with which they result in involuntary separation from family and commitment to a "small scale penitentiary."[2] Recent studies of the institutions to which delinquents are sent indicate that some are more likely to foster future criminal behavior than suppress it.[3] Such contentions vividly contrast with a classic statement on the nature of such confinement:

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[1]As cited in Monrad G. Paulsen, "The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 53.

[2]Linklater and Zana, "Constitutional Law," p. 323, and Francis A. Allen, "The Borderland of the Criminal Law: Problems of 'Socializing' Justice," Social Service Review, XXXII (June, 1958), 116.

[3]Howard, "Children."

> The whole purpose of the confinement is the reformation of the child and not his punishment. Furthermore, the child is not being deprived of his "liberty," as that word is used in the constitutions. The state is exercising parental restraint which is perhaps more severe than that usually exercised by a father, because of the particular viciousness of the child.[1]

Quite clearly, then, there has been a re-thinking of the nature of juvenile court procedures and roles therein. It remains to be shown how these challenges have materialized through legislation and court interpretations.

Juvenile Courts in American Jurisprudence

It is quite common for juvenile courts to exist as part of previously established judicial institutions. In a study completed ten years after Illinois established the first juvenile court system, it was found that only nine jurisdictions made provision for a special court existing outside the regular court structure.[2] The remaining thirty jurisdictions having juvenile courts placed them within circuit, county, or police courts. As statutes were written and revised, there developed three broad categories of structural arrangements: (1) "designated courts" such as municipal, county, district, or circuit courts, which were

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[1] "The Constitutionality of Juvenile Court Acts," Harvard Law Review, XIX (March, 1906), 375.

[2] Sophia P. Breckinridge and Edith Abbott, The Delinquent Child and the Home (New York, New York: Charities Publication Committee, 1910), p. 248.

selected to hear children's cases and while so functioning to be called juvenile courts; (2) "independent or separate courts" whose administration was divorced from other courts; and (3) "coordinated courts" which were interrelated with other special courts such as domestic relations or family courts.[1]

These categories are not mutually exclusive and some states have adopted juvenile court systems containing features of each category. Colorado, for instance, adopted an organization scheme in which all jurisdictions other than Denver had designated juvenile courts, while that city was furnished with a special court for dealing with juvenile problems.[2] Illinois in 1949 revised its juvenile court system by renaming it a "family court" but retained the provision that county and circuit courts were designated to carry out the provisions of the act.[3]

A 1959 study indicated that of the fifty-one jurisdictions in the United States having juvenile courts, forty-one had adopted the designated method of organization, seventeen jurisdictions had some variety of independent or separate juvenile courts, and eleven had a coordinated

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[1]Robert G. Caldwell, "The Juvenile Court: Its Development, and Some Major Problems," Journal of Criminal Law, Criminology and Police Science, LI (January-February, 1961), 499.

[2]Sussmann, Law, p. 66.

[3]Ill. Rev. Stat. (1949), c. 23, secs. 192a, 196a, and 196b.

juvenile court system.[1] Perhaps the most compelling reason for the widespread use of the designated court can be found in the desire of legislators to avoid constitutional difficulties that may arise with the creation of new courts. Many state constitutions have provisions limiting the power of the legislature to modify the judicial structure, thus creating barriers to undisguised innovations.[2] Constitutional reasons aside, Roscoe Pound has argued that juvenile courts should be placed within the court structure of general jurisdiction:

> . . . [W]here separate courts are set up, jurisdictional lines become necessary which are not easy to draw in advance of experience. Such courts do not need to be separate in order to secure the services of specialist judges. As has been said before and cannot be said too often, specialized courts should be replaced by specialist judges sitting in branches or departments of unified courts.[3]

Constitutional necessity and organizational neatness have accordingly combined to provide strong impetus for the placement of juvenile courts within the traditional court

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[1]Sussmann, Law, pp. 65-76. The total number of varieties of juvenile court structural arrangements exceeds the fifty-one jurisdictions because many states have utilized more than one alternative organizational scheme.

[2]Bloch and Flynn, Delinquency, p. 327.

[3]Roscoe Pound, Organization of Courts (Boston, Massachusetts: Little, Brown and Company, 1940), pp. 271-272. See also Roscoe Pound, "The Juvenile Court and the Law," in Cooperation in Crime Control: 1944 Yearbook of the National Probation Association, ed. by Marjorie Bell (New York, New York: National Probation Association, 1944), pp. 9-11.

structure. Getting additional mileage, so to speak, out of existing courts would ordinarily be less expensive than the creation of a new court structure.

One variety of juvenile court organization that deserves note is the unified system used by Connecticut, Rhode Island, and Utah. In each of these states there exists a statewide juvenile court system which has exclusive jurisdiction, with various exceptions, over delinquent children below certain ages.[1] The states are divided into districts with branches of the court assigned to each, except in Rhode Island where the judges cover the entire state as one district.[2] Such a plan permits full-time juvenile court judges, working in more than one county, to blanket the state with a juvenile justice system providing services on an equal basis to all areas. The argument supporting a unified structure of juvenile justice throughout a given jurisdiction generally rests upon the assumption that a standardization of procedures and services would result from unification.[3] Due to various factors, including financial, this scheme has been confined to the states mentioned above.

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[1]Sussmann, Law, p. 66, pp. 73-74.

[2]Standard Juvenile Court Act (6th ed.; New York, New York: National Council on Crime and Delinquency, 1959), p. 13. Hereafter this source will be cited as follows: S.J.C.A.

[3]Edward J. Bander, "Problems of Area Jurisdiction in Juvenile Courts," Journal of Criminal Law, Criminology and Police Science, XLV (March-April, 1955), 672.

Optimism expressed over twenty years ago concerning the likelihood of extensive adoption of this plan has not been borne out.[1]

Development of coordinated juvenile courts, or family courts, can be viewed primarily as a horizontal expansion of juvenile court jurisdiction. This generally involves, minimally, bringing under the scope of the juvenile authority actions of adults that contribute to the delinquency, dependency, or neglect of children. If the courts are to deal with the "whole child" their authority must extend to his environment and those who shape his life. Obviously parents are the primary object of such expansion of jurisdiction. Those actions closely related to family relationships that are conventionally divided among a number of civil and criminal courts could thus be dealt with by one institution.[2] In addition to cases involving contributing to delinquency, dependency, or neglect, the family court is often permitted to handle adoptions, matrimonial actions, minor crimes among family members, and all varieties of problems affecting family relationships that would otherwise be dealt with in a number of separate state agencies.

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[1]Sol Rubin, "State Juvenile Court: A New Standard," Focus, XXX (July, 1951), 107.

[2]Nanette Dembitz, "Ferment and Experiment in New York: Juvenile Cases in the New Family Court," Cornell Law Quarterly, XLVIII (Spring, 1963), 499-500.

Illinois adopted a limited family court during the period from 1949 to 1965 by including within the jurisdiction of that court cases involving adult contribution to delinquency, dependency, and neglect.[1] New York, on the other hand, has adopted a family court system which was given broader jurisdiction including disorderly conduct charges between family members.[2]

The regular criminal courts have relationships with juvenile courts in two important ways. As previously indicated, most juvenile court statutes provide that the judges handling offenses by juveniles shall be drawn from the existing court personnel. This has meant that in all but the larger metropolitan areas and the unified juvenile justice systems, juvenile court judges frequently preside in criminal proceedings as well.[3] While the goal of special procedures for juvenile offenders has thus been achieved, the hopes of early reformers that specially trained experts would preside in juvenile court have yet to be broadly realized as the requirements for county or

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[1] Ill. Rev. Stat. (1949), c. 23, secs. 192a, 196a, and 196b.

[2] McKinney's Consolidated Laws of New York Annotated, Book 29A - Judiciary, Family Court Act (Brooklyn, New York: Edward Thompson Company, 1963), sec. 811. Hereafter this source will be cited as follows: N.Y. Family Court Act, sec. 811 (McKinney 1963).

[3] See Shirley D. McCune and Daniel L. Skoler, "Juvenile Court Judges in the United States," Crime and Delinquency, XI (April, 1965), 126.

circuit court judges in most states do not include such qualifications, except as they are acquired through experience on the job.[1]

In addition to this personnel interconnection, there frequently exists in juvenile court statutes provision for transfer of cases from juvenile to criminal courts, and vice versa. Although most juvenile courts are given exclusive original jurisdiction over children between specified ages who have committed criminal offenses, as well as cases involving neglect, dependency, and instances of "incorrigibility," the general pattern has been to provide for some method of transfer to criminal court of those children who are accused of particularly serious crimes.[2] Once the juvenile court divests itself of jurisdiction, it no longer has any role to play in that case.

Juvenile courts often also have rather close ties with varied other state institutions. So broad has this web of responsibilities become that administrative functions, as opposed to judicial, have become an important part in the court operation.[3] Because the judge is responsible for

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[1]For comment on such on-the-job training, see Thomas C. Hennings, "Effectiveness of the Juvenile Court System," Federal Probation, XXIII (June, 1959), 3-8.

[2]For an excellent brief summary of the jurisdiction of American juvenile courts, see Leo J. Yehle, "The Role of the Juvenile Court in Our Legal System," Marquette Law Review, XLI (Winter, 1957-1958), 284-295.

[3]Keve, "Administration," pp. 172-199.

the determination of a treatment program for youths placed on probation, it has been recognized that close cooperation with the probation staff is essential for an efficient probation program. To this end, most states have placed probation departments under the control of the juvenile court they will be serving.[1] Roscoe Pound has referred to the probation function as analogous to the "masters of chancery" used by courts of equity to implement their decisions.[2] As previously noted, in the early days the juvenile courts frequently used volunteers from social organizations as their probation officers, and such utilization of unpaid services is not uncommon today. However, such states as Illinois long ago made at least some provision for the appointment and compensation of court officers of suitably trained and experienced probation personnel.[3]

One of the more conspicuous trends in juvenile court programs has occurred with regard to institutional arrangements for effecting care, custody, and reform. From their inception juvenile courts have been empowered to detain and commit children adjudged delinquent, dependent, or

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[1]U.S., President, Task Force Report: Juvenile Delinquency and Youth Crime - Report on Juvenile Justice and Consultants Papers, (The President's Commission on Law Enforcement and Administration of Justice; Washington, D. C.: Government Printing Office, 1967), p. 6. Hereafter this source will be cited as follows: Task Force Report.

[2]Pound, "The Juvenile Court," p. 17.

[3]Ill. Rev. Stat. (1969), c. 37, sec. 706-5.

neglected.[1] The common practice has been to prohibit the detention of children in places designated for the confinement of adult offenders.[2] In the years immediately following enactment of the first juvenile court laws, the commitment institutions were of the industrial and reform school variety. Once a child was committed to such an institution, his supervision was in the hands of the school administrators who were often responsible for making recommendations to the court concerning his length of stay.[3]

There developed in the late 1930's and early 1940's a movement to centralize the administration of treatment programs for minors in trouble with the law.[4] California established one of the first unified authorities for administering correctional programs designed for youths adjudged by the various courts to be in need of supervision.[5] Illinois did not act in this area until 1953 when the Illinois Youth Commission was created to provide for the unified

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[1] Laws of Illinois (1899), pp. 133-134.

[2] See Ill. Rev. Stat. (1969), c. 37, sec. 702-8(1).

[3] See Laws of Illinois (1899), p. 134.

[4] John O. Reinemann, "The Expansion of the Juvenile Court Idea," Federal Probation, XIII (September, 1949), 35-37.

[5] West's Annotated California Codes, vol. 51, Penal Code (St. Paul, Minnesota: West Publishing Co., 1966), sec. 6000. Hereafter this source will be cited as follows: Cal. Penal Code, sec. 6000 (West 1966). For a brief discussion of the impressions juvenile court judges have of the purposes served by camp commitments in California, see Cal. Gov. Comm. Report Pt. II, p. 22.

administration of treatment programs for "young persons found delinquent or guilty of crime."[1] The relationship between juvenile courts and the authority designated to administer the institutions for juvenile offenders has developed along lines whereby the court acts as the input mechanism for that authority.[2] Once a youth has been committed to it, the Juvenile Division of the Illinois Department of Corrections, which replaced the Youth Commission in 1970, may respond in a variety of ways ranging from detention in a state facility for delinquents to discharge from state authority. The close relations which exist between the juvenile courts in Illinois and their probation services are obviously lacking as regards the programs of the Juvenile Division of the state's Department of Corrections.

Shortly after their inception, juvenile courts began performing a variety of social welfare functions such as

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[1] Ill. Rev. Stat. (1953), c. 23, sec. 220d.1.

[2] See Ill. Rev. Stat. (1969), c. 23, sec. 2517 which permitted the Juvenile Division of the Department of Corrections to receive persons committed under the juvenile court act, Ill. Rev. Stat. (1969), c. 37, sec. 705-10, and under the code of criminal procedure, Ill. Rev. Stat. (1969), c. 38, sec. 119-2. These statutes limit the inputs to the Juvenile Division of the Department of Corrections to boys under seventeen and girls under eighteen found delinquent, and inputs from criminal courts are limited to boys under seventeen and girls under eighteen convicted of a crime and sentenced to a term of imprisonment. If the juveniles convicted of a crime have maximum terms that have not expired by their twenty-first birthday and they have not been released, they must at age twenty-one be transferred to an adult division of the Department of Corrections, Ill. Rev. Stat. (1969), c. 23, sec. 2523(2).

foster home care for dependent and neglected children, development of rules and regulations guiding probation officers in their case work, providing guidelines for the intake officers of the court to follow when deciding whether or not to file a formal petition, advising school officials on desirable programs to combat delinquency, and generally acting in conjunction with other local agencies, both private and public, in the effort to prevent delinquency.[1] State agencies have also become involved in general delinquency prevention work although not to an extent which eliminates the juvenile court judge in such matters. Alfred Kahn, Professor of Social Work at Columbia University, has summarized the situation on this point:

> . . . [W]hile many of the direct-service functions once assumed by courts, particularly for dependent and handicapped children, have by now been assigned to public welfare or health agencies, there are still courts that retain such functions alongside their fundamental jurisdiction in delinquency and neglect. Other courts have developed, or have sought to develop, elaborate diagnostic, detention, and treatment services on the grounds that these services are essential components of the assigned task.[2]

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[1]For a general discussion of the relationship between juvenile courts and social welfare institutions, see the following: Tappan, "Juridical," pp. 144-171; Keve, "Administration," pp. 172-199; and Katherine F. Lenroot, "The Juvenile Court Today," Federal Probation, XIII (September, 1949), 9-15.

[2]Alfred J. Kahn, "Court and Community," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 219.

By way of a brief recapitulation of the status of juvenile courts in the United States, it may be said that they are ordinarily statutory courts designed to use non-criminal procedures to achieve a socially desirable end by utilizing both the coercive authority of the state and modern sociological tools. Due in no small measure to this mixed heritage, juvenile courts occupy a sensitive position within the judicial structure.[1] They are subject to attack because legal formalities are abandoned in an effort to maximize social goals and also because those goals are only imperfectly attained. Criticisms are directed partially to procedures used in court, to its position in the judicial structure, to the caliber of personnel serving the court, to the substantive action of the court, and in general to the assumptions surrounding juvenile court operation.

Having broadly examined the rise of juvenile courts in the United States, it is now appropriate to look into the substance of those challenges that have a legal foundation and to the resultant reactions by the appellate courts, legislatures, and juvenile court judges themselves. Because appellate decisions have recently played such a prominent role in the reshaping of juvenile court procedures, prime attention will be given to these.

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[1]For a full discussion of this hybrid background of juvenile courts, see Warren H. Dunham, "The Juvenile Court: Contradictory Orientations in Processing Offenders," Law and Contemporary Problems, XXIII (Summer, 1958), 508-527.

Early Judicial Questioning

The years before 1900 were a period of theory building in so far as the legal foundations for the juvenile court were being laid in a relatively few but significantly important number of cases. From these early decisions came the legal toehold that ultimately convinced legislators of the constitutional propriety of juvenile courts.

The Supreme Court of Pennsylvania in 1839 rendered a decision concerning a statute designed to provide special protection for children deprived of proper parental care. The Pennsylvania high court ruled on the nature of a house of refuge and on the power of the state to provide such institutions for the care and protection of children. After referring to the institution as a school whose purpose was not punishment, the court held:

> The object of the charity is the reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all by separating them from the corrupting influence of improper associates. To this end may not the natural parents, when unequal to the task, or unworthy of it, be superceded by the parens patriae, or common guardian of the community? . . . The right of parental control is a natural, but not an inalienable one.[1]

The provisions of the act authorized the commitment of

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[1] Ex parte Crouse, 4 Wharton 9 (Pa. 1839). Mary Ann Crouse, at the motion of her mother, had been committed to the Philadelphia House of Refuge "by reason of her vicious conduct." No criminal action was reported.

infants to the house of refuge who were found vagrant or in violation of any criminal laws. Similar decisions were rendered in other states in the middle years of the Nineteenth Century.[1] An important point of interpretation was that the houses of refuge were viewed not as reformatories or juvenile prisons but as charitable institutions designed to help the less fortunate children in the state.

Authority for the state to replace parental control over children came from that ancient doctrine, parens patriae, referred to in the Pennsylvania decision. Various American courts relied on this legal principle to uphold authoritative actions by the state in affecting child-parent relations. In Cowls v. Cowls[2] for example, the Illinois Supreme Court in 1846 held that the power of the court to interfere with and control not only the property but the personal freedom of children was sufficiently well established to be beyond question. This authority could be exercised when, through neglect or abuse, the parent demonstrates an inability or disinclination to care for his children. The Illinois Supreme Court ruled that the authority

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[1]See Roth v. House of Refuge, 31 Md. 329 (1869), Prescott v. State of Ohio, 19 Ohio St. 184, 2 Am. R. 388 (1870), and Milwaukee Industrial School v. Milwaukee County Supervisors, 40 Wis. 328, 22 Am. R. 702 (1876).

[2]8 Ill. 534 (1846). The reader might be interested to know that appellant was represented by one A. Lincoln who argued the case before the Illinois Supreme Court. The court ruled against the appellant.

was not a carte blanche grant of power to interfere with the "proper" parent-child relationships, and that the rights of both the parents and the child must be respected. In 1849 the highest Illinois court further ruled that although there is a presumption that the right of the parents to the custody of their children is valid, the state, through its courts of chancery, must consider what is best for the child when the issue is presented before them.[1] Once the parens patriae authority is claimed, the power of the state was held to extend only to the placing of others over the child with the same limited power as a parent would ordinarily have.[2] Clearly this broad authority of the state was not without limitations.[3]

The procedures by which minors were placed in a Chicago reform school in the middle years of the Nineteenth Century were successfully challenged in 1870.[4] An Illinois court said of the practice of sending to reform school children between six and sixteen found to be lacking in proper

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[1] Miner v. Miner, 11 Ill. 35, 44 Am. Dec. 708 (1849).

[2] People ex. rel. Graufield v. Perkins, 3 Ill. Cir. Ct. 492 (1868).

[3] For an early discussion on parental duties and rights, see William Blackstone, Commentaries on Laws of England I (4th ed.; Chicago, Illinois: Callaghan and Co., 1899), pp. 394-395, and James Kent, Commentaries on American Law II, ed. by John M. Gould (12 ed.; Boston, Massachusetts: Little, Brown and Co., 1896), pp. 303-304.

[4] People ex. rel. O'Connell v. Turner, 55 Ill. 280, 8 Am. R. 645 (1870).

parental care, and of growing up in mendicancy, ignorance, idleness, or vice, but who had been convicted of no crime:

> If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as parens patriae, exceed the power of the natural parent, except in punishing crime? . . . The disability of minors does not make slaves of them. They are entitled to legal rights . . .[1]

Only those minors convicted of criminal action in a proper court of law were held subject to such confinement, but avenues for non-penal custody also existed. The action of the Illinois legislature in 1879 establishing an industrial school for girls to which minor females found in need of care could be sent[2] soon produced litigation showing this. The state's Supreme Court, in passing on the power of the legislature to so confine juveniles, distinguished this institution from the Chicago reform school on the grounds that the 1879 statute was more carefully drawn and and not designed to imprison minors merely for the protection of society. The court said:

> This institution is not a prison, but it is a school, and the sending of a young female child there to be taken care of, who is uncared for, and with no one to care for her, we do not regard as

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[1] Ibid., for further discussion of this case, see Julian W. Mack, "The Juvenile Court," Harvard Law Review, XXIII (December, 1909), 114.

[2] Laws of Illinois (1879), p. 309.

> imprisonment. We perceive hardly any more restraint of liberty than is found in any well regulated school.[1]

In the years immediately preceeding the enactment of the Illinois juvenile court act, the Illinois Supreme Court further indicated sympathy for legislative efforts to deal specially with the problems of juveniles. The creation of a state reformatory in 1893 and permitting the incarceration therein of juveniles convicted of crimes[2] provided the legal background for a review of the nature of such institutions. In 1894 in People v. Illinois State Reformatory[3] the court, disagreeing with the Attorney General, specifically referred to the reformatory's purpose as punishment, albeit human and benign in method. Just three years later, however, in Henderson v. People[4] the court was stressing the rehabilitative aspects of such confinement, giving only secondary consideration to the punitive intentions of the law:

> The reformatory is different, in its object and purposes, from the penitentiaries, and cannot be called a penitentiary. The main object and purpose of the reformatory, although confinement there is a punishment for crime, are the reformation of those who, from immature age, are presumably proper objects of efforts of reformation.

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[1] In re Ferrier, 103 Ill. 367, 371, 42 Am. R. 10 (1882).

[2] Laws of Illinois (1893), p. 168.

[3] 148 Ill. 413, 36 N.E. 76 (1894).

[4] 165 Ill. 607, 611, 46 N.E. 711 (1897).

Once the courts accepted the view that reform schools were designed to help youths in trouble with the law rather than to punish them, it was but a small step to accept the argument that such confinement was permissible even without traditional procedural protections. In any event, at the end of the Nineteenth Century there was in Illinois precedent for the confinement of dependent and neglected children as well as a reasonable grounds to believe that incarceration of juveniles for law violations in institutions providing some semblance of an education program, might be interpreted as beneficial rather than punitive. There was, in other words, sufficient legal precedent to believe that the courts would accept specialized procedures for the confinement of dependent, delinquent, and neglected juveniles on the grounds that such action was beneficial to the child.

Building on the precedents cited above, appellate courts, in the years following the establishment of the first courts, strengthened the constitutional and legal foundations necessary for the continued existence of these new judicial organs. Perhaps the thorniest issue to be dealt with was the nature of the court itself: criminal or non-criminal? Herbert Lou succinctly stated the matter as follows:

> If they are not of a criminal nature, they are not unconstitutional because of their non-conformance to certain constitutional guarantees, usually

> contained in the bill of rights, in favor of persons charged with crime.[1]

The appellate courts were faced with the question of whether the juvenile courts were in fact non-criminal or if the non-criminal label was a mere euphemism hiding their punitive purpose. One of the strongest supports for juvenile courts came from the Supreme Court of Pennsylvania in 1905. In the often cited case of Commonwealth v. Fisher[2] it vigorously upheld the constitutionality of the new Pennsylvania juvenile court law on the basis that the procedural innovations were predicated on the court's non-criminal basis:

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parents need no process to deprive his child of its liberty by confining it in his home . . . nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose.

Of this case one observer has noted that the opinion seemed to be groping for the legal means to justify passing favorably on the court and in so doing removed from the purview of due process requirements those children not formally accused of criminal action but only of some anti-social

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[1] Lou, Juvenile Courts, p. 10.

[2] 213 Pa. 48, 51, 62 A. 198 (1905). Emphasis added.

behavior.[1] Scores of appellate decisions followed the Fisher case utilizing the same approach.[2] To illustrate, the Idaho Supreme Court said in 1908 about that state's juvenile court statute:

> . . . [T]his statute is clearly not a criminal or penal statute in its nature. Its purpose is . . . to relieve them from the odium of criminal prosecutions and punishment.[3]

Rejecting claims of unconstitutionality due to such matters as denial of bail, lack of confrontation of witnesses, denial of due process, and denial of right to jury, the Connecticut Supreme Court in Cinque v. Boyd[4] similarly justified rejection of petitioner's claim by saying:

> In holding that the act now before us for construction is not of a criminal nature we dispose of all claims founded upon its want of conformity to the constitutional guaranties in that regard.

This approach, while prevalent was not altogether unquestioned. Thus, in a similar ruling in New York one justice indicated his criticism of the rationalization by asking

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[1] Edward Lindsey, "The Juvenile Court Movement From a Lawyer's Standpoint," The Annals, LII (March, 1914), 145. See also George Davidson, "In re Gault: The Juvenile's Gideon," Illinois Bar Journal, LVI (February, 1968), 488-503.

[2] For a listing of the many cases, see: Pee v. U.S., 274 F.2d 556, 561 (D.C. Cir. 1959), and Orman W. Ketcham and Monrad G. Paulsen, Cases and Materials Relating to Juvenile Courts (Brooklyn, New York: The Foundation Press, 1967), which contains exerpts from the more significant cases.

[3] Ex parte Sharp, 15 Id. 120, 121, 96 Pac. 563 (1908).

[4] 99 Conn. 70, 77, 121 A. 678 (1923).

rhetorical questions about the nature of the constitutional protections:

> Do the Constitution of the United States and the Constitution of the State of New York apply to children or only to adults? . . . May a child be incarcerated and deprived of his liberty in a public institution by calling that which is a crime by some other name . . .[1]

As an early juvenile court legalist, he voiced what would become common criticism about the practice of committing juveniles to "training schools" for the remainder of their minority and then referring to such incarceration as non-criminal. For some years, however, his view was in the minority.[2]

Federal courts were quickly won over to the side of juvenile court proponents and in 1911 a U.S. circuit court upheld the constitutionality of an Ohio juvenile court statute.[3] Petitioner's appeals of denial of due process and other alleged violations of his constitutional rights were rejected on the basis of the reasoning described above. Delinquency was viewed as merely an adjudication of a juv-

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[1]People v. Lewis, 260 N.Y. 171, 175, 183 N.E. 353 (1932).

[2]For a review of similar cases upholding the view that juvenile courts are non-criminal, see the following: Ex parte Jones, 34 Cal. App.2d 77, 93 P.2d 185 (1939); In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); In re Dargo, 81 Cal. App.2d 205, 183 P.2d 382 (1947); In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. den. 348 U.S. 973 (1955); U.S. v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); Pee v. U.S., 274 F.2d 556 (D.C. Cir. 1959); and In re James L., 25 Ohio Op.2d 369, 194 N.E.2d 797 (1963).

[3]Ex parte Januszewski, 196 F. 123 (C.C.S.D. Ohio 1911).

enile found in need of assistance and reformation by a legally designated arm of the state. The "police power," generally associated with the Tenth Amendment to the United States Constitution, was deemed to preserve state authority to enact juvenile court statutes providing for the care, custody, and control of delinquent, dependent, or neglected children.[1]

For the half century or so after Illinois had passed the first such statute, the general, though not universal, trend in higher court decisions was to uphold their constitutionality. This rather lengthy period of judicial acquiescence led one commentator to the conclusion that all constitutional challenges were long laid to rest, thus permitting proponents of the court to direct their attention to other more pressing problems.[2] Such views were less than completely accurate.

The dating of the first reluctant steps toward a re-evaluation of the assumed non-criminal nature of juvenile courts cannot be precisely determined chronologically. Perhaps this concept was never completely accepted by appellate judges, with their reservations being submerged until an evaluation of the results from implementation of this new theory was possible.

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[1]See Am. Jur., "Juvenile Courts," sec. 14.

[2]Harrison A. Dobbs, "In Defense of Juvenile Courts," Federal Probation," XIII (September, 1949), 24-29.

Recognition that classifying a juvenile as a delinquent rather than a criminal did not free him completely from onus, constituted one avenue for more critical questioning of the juvenile court process. If juvenile courts were truly non-criminal then the stigma attaching to criminal court conviction would be eliminated by utilizing the new labels of delinquency, dependency, and neglect. That this did not result was recognized in 1946 in Jones v. Commonwealth.[1] Although the appellate court did not accept the view that juvenile courts were necessarily criminal tribunals merely because some aspects of the proceeding so indicated, it is clear that doubts were in evidence. One of the strongest and most quoted opinions attacking the theory of the non-criminal nature of juvenile courts was given in a dissenting opinion in In re Holmes[2] by Justice Michael Mussmano. Although the object of the law may not be punishment, the effect may be punitive and on this point Justice Mussmano wrote:

> The grim truth is that a Juvenile Court record is a lengthening chain that its rivited possessor will drag after him through childhood, youthhood, adulthood and middle age. . . . [W]hen the minor is charged with what, (as against an adult,) would be a felony, and the minor denies the charge, the resulting proceeding can only be a judicial contest

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[1] 185 Va. 335, 38 S.E.2d 444 (1946).

[2] 379 Pa. 599, 109 A.2d 523 (1954), cert. den. 348 U.S. 973 (1955).

> to determine conflicting facts and contentions, and, being such, it is a trial in every sense of the word.[1]

This view is quite removed from the earlier opinions that juvenile procedures were devoid of all aspects of criminality.

An even more comprehensive challenge was given in 1952 in a California case where an appellate court referred to the view that an adjudication of wardship on a delinquency petition was not a conviction of a crime as a legal fiction doing violence to reason.[2] It is interesting to note that eight days after this decision, another California appellate court held that juvenile court action was not criminal and that commitment of juveniles to juvenile homes was not imprisonment.[3] This division in California courts reflected the growing division among commentators on this issue. A Wisconsin appellate court in 1966 came very close to crossing the boundary when it said that juvenile court procedures smack of crime and punishment with retribution having a role to play in court dispositions.[4]

Outside the courtroom there have also been critical commentaries about the non-criminality assumption. The

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[1] Ibid., p. 605.

[2] In re Contreras, 109 Cal. App.2d 787, 241 P.2d 631 (1952).

[3] In re Magnuson, 110 Cal. App.2d 73, 242 P.2d 362 (1952).

[4] In re Winburn, 32 Wis.2d 152, 145 N.W.2d 178 (1966).

President's Commission on Law Enforcement and the Administration of Justice in its Task Force Report on juvenile justice observed that not only are elements of criminality present in juvenile courts but that their informal procedures may in fact hinder the child-saving goals.[1] Another writer observed that the practical effects of being adjudged delinquent are not different in kind than being found guilty of criminal action, often with equally harsh formal penalties although they are not labeled as such.[2] The stigma, in terms of specific penalties may include heightened police surveillance, neighborhood isolation, negative reaction by school officials, rejection by prospective employers, and inability to win acceptance into officer training in the armed forces.[3] Thus, as Paul Tappan has written:

> Much has been made of the fact that the child in juvenile court is not charged with crime and cannot be convicted. This technical consideration, coupled with the creed that he is not punished for any wrong but is "saved" from a life of crime, has gone lamentably far to subvert both the rights and responsibilities of children. Only by interpreting juvenile court laws as noncriminal have the higher courts been able to uphold them. . . . The state's purpose may not be punitive, as the courts have

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[1] Task Force Report, pp. 30-31.

[2] Stephen M. Herman, "Scope and Purpose of Juvenile Court Jurisdiction," Journal of Criminal Law, Criminology and Police Science, XLVIII (March-April, 1958), 592.

[3] Edwin M. Lemert, "The Juvenile Court - Quest and Realities," in Task Force Report, p. 92.

> tirelessly repeated, but the deprivations to the child and his parents are no less real because they are benignly inspired.[1]

Closely related, but not identical to the problem of juvenile court non-criminality, is the issue of whether the effect of the court rulings are punitive or rehabilitative. Do the juvenile courts operate in fact as well as in theory to help guide the erring youths down the path toward good citizenship, or do they merely lay the societal strap against offending juveniles under the guise of rehabilitation? An Illinois appellate court in 1903 agreed to the former interpretation.[2] The Illinois Supreme Court subsequently upheld this ruling in an opinion typical of the time, saying:

> Our statute and those of a similar character treat children coming within their provisions as wards of the state to be protected, rather than criminals to be punished, and their purpose is to save them from the possible effects of delinquency and neglect liable to result in their leading a criminal career.[3]

Similar views were expressed more recently in a federal district court when, in reference to the juvenile court statute of Washington, D.C., it was held that constitutional safe-

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[1]Tappan, "Juridical," p. 159.

[2]City of Chicago v. Cook County, 106 Ill. App. 47 (1903).

[3]Lindsay v. Lindsay, 257 Ill. 328, 330, 100 N.E. 892 (1913). For further investigation of cases holding similar opinions, see the following: Mill v. Brown, 31 Ut. 473, 88 P. 609 (1907); In re Turner, 94 Kan. 115, 145 P. 871 (1915); Ex parte Daedler, 194 Cal. 320, 228 P. 467 (1924); People v. Day, 321 Ill. 552, 152 N.E. 495 (1926); and Killian v. Burnham, 191 Okla. 248, 130 P.2d 538 (1942).

guards guaranteed to one accused of crime have no application here because the law in question is rehabilitatory and not punitive in intent and effect.[1] Even under such holdings, however, the juvenile courts were under a caution against using their powers in a punitive manner not designed for the good of the child.[2]

Although some judicial doubts about the presence of clearly punitive practices in juvenile court procedures were expressed shortly after their inception,[3] fundamental challenges through appellate litigation did not appear until considerably later. Representative of the more realistic view that has since become prevalent is a 1941 opinion by the Supreme Court of Massachusetts. In Commonwealth v. Johnson[4] that court noted that while commitment may not be strictly punitive, it has elements of a disciplinary nature closely related to punishment. A federal district court in 1960 bluntly referred to the practice of committing delinquents to training schools or reform schools and then

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[1] White v. Reid, 125 F. Supp. 647 (D.C.D.C. 1954).

[2] For example, see In the Matter of Johnson, 30 Ill. App.2d 439, 174 N.E.2d 907 (1961).

[3] See Weber v. Doust, 81 Wash. 668, 143 P. 148 (1914), where an appellate court awarded civil damages to parents of a child illegally detained by police, overruled in Weber v. Doust, 84 Wash. 330, 146 P. 623 (1915). Also see State ex. rel. Cave v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914).

[4] 309 Mass. 476, 35 N.E.2d 801 (1941).

claiming it was done solely in a paternalistic spirit as not bearing the aspect of reality.[1]

Corollary to the increasing doubts about the non-punitive results of juvenile court adjudications that were developing in appellate rulings, was the increasing occurrence of highly critical reports and articles on the effects of being adjudged delinquent and subsequent commitment to so-called "training schools." Not only were these institutions often not rehabilitating delinquents but the very nature of the "schools" violated the presumption that juvenile court action was non-punitive. One recent study of several "training schools" reported that many regularly utilized corporal punishment to enforce discipline.[3] If such happenings are representative, comments that "training schools" are often merely juvenile prisons can be readily understood.[4]

Even aside from the intensity of punishment, the time of incarceration may be considerably longer for juveniles than for adults found guilty of violating the same act that constituted the basis for the delinquency adjudication.

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[1] Trimble v. Stone, 187 F. Supp. 483 (D.C.D.C. 1960).

[2] Henry D. McKay, "Report on the Criminal Careers of Male Delinquents in Chicago," in Task Force Report, pp. 107-113.

[3] Howard, "Children," March 31, 1969, sec. 2, p. 15.

[4] Bloch and Flynn, Delinquency, p. 357.

That result may stem simply from the common practice of making the delinquent a ward of the court until he attains his majority, unless sooner reformed; while the adult receives only a fine or a short workhouse sentence in the typical misdemeanor case. It should, however, also be noted that the growth of the indeterminate sentence for adult felons, with sentences expressed as having minimum and maximum periods of confinement and with parole a possibility, creates a situation in which the formal sentence for adults committing a felony must be qualified by regard for the time they will actually serve. Thus, comparisons with juvenile court sentences cannot be readily made. The President's Commission noted that not infrequently the sanctions applied by juvenile courts are considerably more severe than those an adult would receive in criminal court.[1] This would seem to indicate that the commission agreed with one writer's view that the system of juvenile justice is all too often a "travesty of justice."[2] While these criticisms have been directed toward the punitive results of juvenile court action, other commentators have accused them of "coddling" criminals and of not dealing harshly enough with them.[3]

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[1] Task Force Report, p. 23.

[2] Fred E. Ellrod, Jr. and Don H. Melaney, "Juvenile Justice: Treatment or Travesty?" University of Pittsburgh Law Review, XI (Winter, 1950), 277-287.

[3] J. Edgar Hoover, (letter to editor), American Bar Association Journal, XLIX (June, 1963), 562.

Concerning the applicability of the various constitutional protections afforded accused persons in criminal prosecutions, the initial position of appellate courts was almost uniformly one of denying these to persons appearing before juvenile courts. If one accepted the view that no punishment, as such, was involved and the state was acting as parens patriae and not in its capacity as prosecutor of criminals, then such a conclusion seemed plausible.[1] Moreover, when objections were raised against ignoring consitutional guarantees in this early period of appellate court evaluation, the objections were at times based not so much upon the procedural rights of infants as upon the "property rights" of parents to the custody of their children. Thus, in one dissenting opinion a Mississippi Supreme Court justice expressed the view that the concept of due process of law prohibits the taking of one's children in an arbitrary fashion.[2]

Perhaps the first major shift of judicial opinion came in 1955 when a district court in Washington, D.C. held:

> The question boils down simply to whether the legislature could deprive, had it so intended, a youth of /his/ constitutional rights. This Court believes it could not . . . Yet by some sort of rationalization, under the guise of protection measures, we have reached a point where rights once held by

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[1]See State ex. rel. Matacia v. Buckner, 300 Mo. 359, 254 S.W. 179 (1923).

[2]Bryant v. Brown, 151 Miss. 398, 178 S. 184 (1928).

> a juvenile are no longer his. Have we now progressed to a point where a child may be incarcerated and deprived of his liberty during his minority by calling that which is a crime by some other name? . . . [I]n the District of Columbia, where the charge of the Juvenile Court is one of crime which . . . is called "juvenile delinquency," then it must be surrounded by the guarantees and limitations of the Federal Constitution.[1]

Generally state appellate courts refrained from adopting such strong language as expressed immediately above, but doubts about the alleged non-criminal and non-punitive nature of juvenile courts was clearly in evidence in the years just prior to the Gault decision.

Specific Procedural Problems

The growing ferment over juvenile court practices frequently concentrated upon particular procedures, and produced a considerable literature of a critical nature. On the issue of police discretion at the time of arrest of a juvenile, the Children's Bureau, in its Standards for Juvenile and Family Courts, urged that the decision by the police officer as to whether or not to refer the child to the juvenile court should be based on the "gravity of the situation."[1] The police are further advised against administering informal probation or forcing restitution for any

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[1] In re Poff, 135 F. Supp. 224, 226-227 (D.C.D.C. 1955).

[2] U.S., Department of Health, Education, and Welfare, Children's Bureau, Standards for Juvenile and Family Courts, (Pubn. No. 437; Washington, D.C.: Government Printing Office, 1966), pp. 47-48. Hereafter this source will be cited as follows: Standards.

damages. The point of such recommendations is a desire to reduce inequities which mushroom when subjective judgments prevail. It may be legitimately contended that the "official delinquent," as distinguished from other youths who commit delinquent acts, becomes the product of a subjective judgment on the part of a police officer who decided to refer the former juvenile to court and merely admonish the latter.[1] This "social judgment" might be based on such capricious factors as race, style of dress, length of hair, or other element not pertinent to the needs of the juvenile or society.

There are those who maintain not only that police screening is unavoidable but that it is a positive aspect of the entire procedure. One article mentioned the following as defenses to this practice: the reduction in court case loads; the avoidance of an adjudication of delinquency for those not committing a serious anti-social act; and increased parental control by police support and the spectre of possible court referral if a change in behavior is not forthcoming.[2] Without doubt the first point is of major importance as the resources of juvenile courts are not sufficient in many instances to deal with any large upsurge

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[1]Irving Piliavin and Scott Briar, "Police Encounters with Juveniles," American Journal of Sociology, LXX (September, 1964), 214.

[2]Barrett, Brown, and Cramer, "Juvenile Delinquents," p. 785.

in the number of cases which would likely result from sharp restrictions being placed on the screening authority of police.

A second form of "informal adjustment" results when the intake services of the court resort to informal probation instead of filing a formal delinquency petition. Full objectivity may also be lacking at this stage and, in addition, the lack of a full scale investigation and hearing may reduce safeguards for the child to the vanishing point.[1] The Governor's Study Commission in California reported, moreover, that in that state there was frequently no substantial difference between treatment programs for official delinquents and for those dealt with in an informal manner:

> In lieu of the filing of a petition and formal adjudication by the juvenile court on the need for wardship, a disposition liberally used in California is informal probation. This descriptive name is in actuality a misnomer because supervision of minors placed on informal probation generally is not of an informal nature; in fact, it does not materially differ from the supervision provided to those whose cases have been formally adjudicated.[2]

The report was especially critical of the prolonged length of time youths were placed in this status of unofficial delinquency with supervision by probation officers.

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[1]See Paul W. Tappan, "Treatment without Trial," in The Problem of Juvenile Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), p. 293.

[2]Cal. Gov. Comm. Report Pt. II, pp. 45-48.

From a procedural viewpoint, it may be argued that the juvenile is being coerced into accepting a lesser punishment. He avoids the official status of delinquency only by forfeiting his rights to a determination of the facts by a designated judicial officer.[1]

The 1959 Standard Juvenile Court Act makes provision for informal adjustment but cautions against utilizing this procedure unless the specific allegations are clearly justified by the facts of the case.[2] Juvenile courts are further warned against offering informal adjustment as an alternative to the filing of a formal petition. In a similar vein, the Children's Bureau supports this practice but expresses concern that if the court itself undertakes to perform the probation function there may be public confusion as to the nature of juvenile courts as they are performing services that ought to be carried out by social welfare agencies.[3] These often quoted publications seem to represent the middle ground between the legalists who would abolish informal procedures and others who would give to juvenile courts the widest possible discretion in dealing with delinquency problems.

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[1]For further reading into the problems of "informal probation," see Robert Gardner, "Let's Take Another Look at the Juvenile Court," Juvenile Court Judges Journal, XV (Winter, 1964), 17.

[2]S.J.C.A., p. 32.

[3]Standards, pp. 58-59.

In the court hearing, a number of different matters have been of concern to observers of juvenile justice. One concerns the blurring of the two stages of the hearing. Despite recent recommendations designed to bifurcate the hearing into the adjudicatory and dispositional phase, the fact remains that for several decades juvenile courts often made no provision for separating the determination of delinquency from subsequent rulings on treatment programs.[1] One probation officer referred to this lack of differentiation between adjudicatory and dispositional phases as harmful to evidentiary regularity:

> Contrary to much present day practice, the social background of the child and his family should not be presented to the Judge until a legal finding is made on the facts alleged in the petition.[2]

Adjudication of delinquency based upon hearsay testimony can no longer be justifiable under the generic description of juvenile courts as being non-criminal in nature.

Lack of judicial standards has likewise been the object of critical comments by various writers. This situation was most aptly described in the California study:

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[1]See the following: S.J.C.A., p. 47; Standards, p. 69; and Edward F. Waite, "How Far Can Court Procedure be Socialized without Impairing Individual Rights?" in The Problem of Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts Houghton Mifflin Co., 1959), p. 339.

[2]Dale G. Oltman, "The Delinquent Child in Court -- Intake to Disposition," Current Problems in Juvenile Court - Proceedings of the Alabama Work Conference for Juvenile Court Judges, February 11-13, 1965 (Chicago, Illinois: National Council of Juvenile Court Judges, 1965), pp. 26-27.

> There is an absence of well-defined, empirically derived standards and norms to guide juvenile court judges, probation, and law enforcement officials in their decision making. Consequently, instead of a uniform system of justice, varied systems based upon divergent policies and value scales are in evidence.[1]

This conclusion was supported by a study in New York of the variation in juvenile court dispositions as a result of differing attitudes on the part of the presiding judges. It was reported that the rate of dismissal of petitions varied from just over two per cent to almost twenty-five per cent depending upon which judge was presiding, and that the proportion of juveniles sent to detention homes varied from one-third to two-thirds.[2] Clearly, the absence of clear standards operated in this instance to denigrate dispositional regularity. One commentator has written of this problem:

> It is charged that the standards by which they are adjudicated delinquent, dependent, or neglected . . . are so loosely defined as to be meaningless. Coupled with looseness in standards is looseness in procedures. In pre-adjudication stages, police or probation officers take it upon themselves to regulate significant aspects of the conduct and relationships of adolescents and their families. At the adjudication stage important elements of procedural due process are given lip service or, in some jurisdictions, not provided at all. . . .

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[1]Cal. Gov. Comm. Report Pt. II, p. 12.

[2]Justine W. Polier, A View From the Bench: The Juvenile Court (New York, New York: National Council on Crime and Delinquency, 1964), pp. 1-2.

> The great humanitarian reform movement has led to unbridled official discretion often resulting in capricious decisions.[1]

Note must also be taken here of the growing criticism with respect to the common practice of holding juvenile proceedings without the presence of legal representation on behalf of the juvenile. Empirical studies of the frequency of attorney representation in juvenile courts during the early part of the 1960's provide clear evidence that in the overwhelming majority of delinquency hearings no attorneys appeared to represent either the child or his parents.[2] The traditional view of the juvenile court judge acting on behalf of the child as the instrument of parens patriae authority of the state and thus eliminating the need for counsel continues to have some supporters,[3] but the past twenty years have been witness to a gradual shift of sentiment in favor of counsel representation. This is clear from the forceful tone in which the President's Commission on Law Enforcement stressed the need for counsel in juvenile courts:

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[1]Joel F. Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," Wisconsin Law Review, 1965 (Winter, 1965), 8.

[2]For example, see Daniel L. Skoler and Charles W. Tenney, Jr., "Attorney Representation in Juvenile Court," Journal of Family Law, IV (Spring, 1964), 77-97, and Cal. Gov. Comm. Report Pt. II, p. 12.

[3]For example, see Molloy, "Juvenile Court," pp. 1-25. For a concise summary of the various arguments on the issue, see Counsel for the Child, A Symposium on the role of the lawyer in Juvenile Court together with an extensive bibliography (Chicago, Illinois: National Council of Juvenile Court Judges, 1966), pp. 1-48.

> The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or his parent, is the keystone of the whole system of guarantees that a minimum system of procedural justice requires.[1]

Similarly, the California study recommended that the legislature of that state provide not only for informing those concerned of their right to counsel but for the appointment of counsel for indigents.[2]

One final aspect of the adjudication stage of the hearing process deserving mention as a source of criticism concerns the general lack of recognition in juvenile courts of the privilege against self-incrimination.[3] Founded in the theory that juveniles were being helped and not punished for their actions, it logically followed that they could not be considered as incriminating themselves if the judge asked them to describe the events in question. Indeed, a reluctance to cooperate with the court's request might be viewed

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[1]U.S., President, The Challenge of Crime in a Free Society, (The President's Commission on Law Enforcement and Administration of Justice; Washington, D.C.: Government Printing Office, 1967), p. 86. Hereafter this source will be cited as follows: The Challenge of Crime in a Free Society.

[2]Cal. Gov. Comm. Report Pt. I, p. 26.

[3]For general comment, see Matthew J. Beemsterboer, "The Juvenile Court -- Benevolence in the Star Chamber," Journal of Criminal Law, Criminology and Police Science, L (January-February, 1960), 469, and Am. Jur., "Juvenile Courts," sec. 72.

as evidence that the child was unsuitable for the benevolence of the juvenile court. The following exchange between a juvenile court judge and the attorney of an accused delinquent is indicative of the attitude and approach taken in some juvenile courts:

> Counsel: "I'm instructing my client not to testify."
> The Court: "Then, in that case, we will find that the matter is an unfit case for this particular court and certify him to the adult court for trial. He will be ordered confined here until the time of the trial."
> Clerk: "Your Honor, is that a dismissal of the petition in regard to the youth?"
> The Court: "That's right."
> Counsel: "Your Honor, in that respect, I withdraw the objection."
> The Court: "Now, James, what do you have to say about this?"[1]

Although the California study referred to such tactics as unfortunate, no recommendation was made that the juvenile be informed of the privilege against self-incrimination or that it be included in the proposed changes in the juvenile court law.

Problems with the dispositional phase of the juvenile court process have arisen partly from reports of very poor conditions in some juvenile homes[2] and the lack of adequate

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[1]Cal. Gov. Comm. Report Pt. II, p. 10. Another juvenile court judge reported that he used the transfer threat to prevent application of criminal evidentiary rules. See William B. McKesson, "Right to Counsel in Juvenile Proceedings," Minnesota Law Review, XLV (April, 1961), 846.

[2]See J.W. Anderson, "A Special Hell for Children in Washington," Harper's Magazine, CCXXXI (November, 1965), 51-56, and Howard, "Children," March 31, 1969, sec. 2, pp. 13-14.

probationary facilities to implement the court's goal of rehabilitation.[1] If one assumes that the observers are correct when they point to serious deficiencies in the treatment programs, then the argument that juveniles receive beneficial care from the state in return for the abandonment of procedural guarantees is further weakened.

By way of conclusion of this review of changing opinions regarding juvenile court procedures as reflected in the current literature, the following items may be noted: First, there has been increasing recognition that the availability of police records cushions attempts in the juvenile court itself to eliminate any stigma of a criminal nature;[2] Second, our law schools provide surprisingly little course work which prepares their graduates for service either as attorneys in or judges of juvenile courts;[3] Third, service as a juvenile court judge is in most areas a part-time distraction from other judicial duties and an assignment which

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[1]See The Challenge of Crime in a Free Society, p. 12, and Cal. Gov. Comm. Report Pt. II, p. 33. For a general discussion of deficiencies in treatment programs, see Flora R. Schreiber, "The Crisis in our Juvenile Courts," Coronet, XLII (October, 1957), 76-83.

[2]See Cal Gov. Comm. Report Pt. II, pp. 108-109, and Ketcham, "The Unfulfilled Promise," pp. 27-29.

[3]See Daniel L. Skoler, Law School Curriculum Coverage of Juvenile and Family Court Subjects (Chicago, Illinois: National Council of Juvenile Court Judges, 1965), p. 3.

many judges regard as undesirable;[1] Fourth, like other institutions of our society the juvenile courts often lack the administrative aides and physical facilities which the idealist would give them;[2] and Fifth, juvenile courts operate under a status somewhat lower than that of other judicial organs.[3]

Before considering the responses to these recognized weaknesses in juvenile courts, it may be worth while to consider the conclusions reached by the California study:

> . . . [T]he debate is not whether the juvenile court's humanitarian philosophy should be changed. Rather the debate concerns whether or not it is necessary to define legal safeguards so that miscarriages of justice, even though based upon well-intentioned motivations, will be averted. . . . [I]t is a time for change based upon well-reasoned concepts which recognize the juvenile court as a court of law rather than a vaguely defined social agency lacking consistent focus and direction.[4]

This statement succintly summarizes the case for the critics of juvenile courts in the United States. With but few exceptions, criticisms have been designed to improve upon and not to abolish juvenile courts. The purpose of provid-

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[1]See McCune and Skoler, "Juvenile Court Judges," p. 126. For comments on the competence of juvenile court judges, see Hennings, "Effectiveness," pp. 3-8.

[2]See Judges Look at Themselves, p. 20.

[3]Ibid., p. 12. See also Cal. Gov. Comm. Report Pt. II, p. 27, and Robert D. Vinter, "The Juvenile Court as an Institution," in Task Force Report, p. 85.

[4]Cal. Gov. Comm. Report Pt. II, p. 116.

viding more humanitarian programs for dealing with juvenile social offenders must surely be a laudable one to which all but the most intransigent advocates of punitive measures would support.

CHAPTER III

SUPREME COURT ACTION ON JUVENILE JUSTICE

Decisions of the United States Supreme Court, particularly where constitutional issues are involved, only rarely lack previous judicial rumblings augurring future developments. The Gault decision was not one of those rare occasions, rather it was preceeded not only by scores of scholarly calls for re-evaluation of juvenile courts, but also by appellate decisions in the lower federal courts laying the foundation for action at the highest judicial level. These preliminaries to the Gault case require attention if that landmark is to be viewed in proper perspective. The many appellate decisions in state courts having possible influence on the Supreme Court can more usefully be considered later in the focus of actual juvenile court operations at the state level.

Pre-Gault Action

The major preview of what was to come in the Gault case is found in an opinion by the nation's highest court handed down only about a year earlier, in the Spring of 1966, in Kent v. United States.[1] This case was concerned

[1] 383 U.S. 541 (1966).

with the problem of waiver of juvenile court jurisdiction in actions under the District of Columbia juvenile delinquency statute.[1] Holding that this step in the process was "critically important," the court required, among other things, that counsel be present on behalf of the accused juvenile. This decision in effect affirmed a rule previously established by lower federal courts.[2]

Under the relevant statute, the juvenile court judge in the District of Columbia could, after a "full investigation," waive jurisdiction to the criminal court. The intent, presumably, was to transfer hardened juvenile offenders or those committing more serious offenses to the procedures of the regular criminal courts. There were no prescribed standards to follow in such waiver. In 1955 an appellate court upheld this statute against a challenge that denial of due process resulted from this lack of standards.[3] In that case the court merely stated that if the juvenile court judge found "after investigation" that such waiver is in the interest of the public and the child, he could issue such order. The law was not invalid as lacking sufficient guides for the court to follow. The "inves-

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[1]D.C. Code (1961), sec. 11-914. Now D.C. Code (Supp. IV, 1965), sec. 11-1533. No formal hearing was required to waive juvenile court jurisdiction.

[2]Black v. U.S., 355 F.2d 104 (D.C. Cir. 1965).

[3]Briggs v. U.S., 226 F.2d 350 (D.C. Cir. 1955).

tigation" requirement was held, in another case, to require an inquiry into both whether parens patriae authority was in the best interest of the child, and the facts of the alleged offense.[1] Justice Warren Burger in 1960, writing for the District of Columbia Court of Appeals, had, however, held on this issue:

> . . . [N]o formal hearing is required on a waiver of jurisdiction to the District Court. . . . The investigation called for by the statute is an administrative process within the Juvenile Court; no particular standards are prescribed. The Juvenile Court conducts such investigation as is needed to satisfy that court as to what action should be taken on the question of waiver.[2]

Greater recognition of the importance which waiver to criminal court had upon the juvenile accused of law violation came later. In 1964, in Watkins v. U.S.,[3] Justice David Bazelon referred to this aspect of the proceeding as "critically important" for the child and as such, required disclosure of social records used to determine whether waiver was to occur. The issue was considered again one year later in the case of Black v. U.S.[4] and there deemed to be so critical as to require the presence of an attorney at the hearing on waiver. Thus, waiver could no longer be considered outside the purview of due process requirements.

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[1] Pee v. U.S., 274 F.2d 556 (D.C. Cir. 1959).

[2] Wilhite v. U.S., 281 F.2d 642, 643 (D.C. Cir. 1960).

[3] 343 F.2d 278 (D.C. Cir. 1964).

[4] 355 F.2d 104 (D.C. Cir. 1965).

In terms of specific procedural requirements, the Kent decision reiterated the rulings in the Watkins and Black cases, and provided policy guides for juvenile court judges to follow in waiver matters.[1] The significance of the Kent case, however, was not derived solely from the procedural requirements applied to the Washington, D.C. juvenile court, but also from certain dicta of Justice Fortas[2] and from the fact that this was the first instance in which the nation's highest court had considered juvenile court procedures and written an opinion on the subject.

The Kent case began in 1961 when a delinquency petition was filed in the District of Columbia juvenile court on behalf of Morris A. Kent, Jr., age sixteen. It alleged that he entered a woman's apartment, took her wallet, and raped her.[3] During police interrogation, he admitted his involvement in these and other criminal actions. He was at that time on probation from the juvenile court because

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[1]See the policy memorandum at the end of Kent v. U.S., 383 U.S. 541, 566-567 (1966).

[2]Justice Fortas commented on the "social welfare" roots of juvenile courts and noted the gap between purpose and achievement. The child, he wrote, often receives in juvenile courts the worst of both worlds, getting neither the adult procedural protections nor the solicitious care promised for children. Ibid., pp. 554-556.

[3]For a discussion of the facts of the case, see Tom A. Croxton, "The Kent Case and Its Consequences," Journal of Family Law, VII (Spring, 1967), 1-2.

of house-breakings and attempted purse snatchings in 1959. Kent's attorney filed with the juvenile court a motion for a hearing on the issue of waiver and asked that he be given access to his clent's social service file, which would presumably be considered by the court in determining the issue of waiver. The juvenile court judge did not respond to these requests but merely entered an order reciting that after "full investigation" the court waived its jurisdiction and ordered the respondent held for criminal trial. No findings were given in the waiver order, no reasons for waiver were given, and no reference was even made to the motions by Kent's attorney.

After grand jury indictment, Kent was found guilty on six counts of house-breaking and robbery and sentenced to thirty to ninety years in prison. On appeal to the United States Court of Appeals for the District of Columbia[1] and later to the United States Supreme Court, Kent's lawyer urged reversal on a number of grounds: detention without probable cause; unlawful interrogation; lack of sufficient notice to parents; interrogation without benefit of counsel or being advised of this right; unlawful use of fingerprints; and avoidance by the juvenile court of statutory requirements for a "full investigation" on the question of waiver.

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[1] Kent v. Reid, 316 F. 2d 331 (D.C. Cir. 1963). The court rejected appellant's contentions that his waiver to criminal court was improper.

Responding to the claim of inadequate procedural protection in waiver to criminal court, the Supreme Court reversed and remanded the case to the United States District Court for a hearing de novo on that issue. The Supreme Court would ordinarily have remanded the case to the juvenile court for a new determination of waiver, but that could not then be done because Kent was now past the age of twenty-one and, under the federal statute, beyond the jurisdiction of the juvenile court. The high court declined to set petitioner's conviction aside, calling this relief "drastic," but merely re-opened the waiver question directing the district court to determine whether waiver was proper in the first place. If, on what was in effect a rehearing on waiver, the same result was reached as originally held, the conviction could stand, while if waiver was found unwarranted, the conviction would fall. In the latter event, there presumably could have been no further proceedings either in the juvenile court, because of the age limit, or in the criminal case because of lack of a valid waiver. Justice Fortas, writing for the majority, summarized the specific requirements by saying:

> . . . [W]e conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. Under Black, the child is entitled to counsel in connection with a waiver proceeding, and under Watkins, counsel is entitled to see the child's social records. These rights are meaningless -- an illusion, a mockery --

> unless counsel is given an opportunity to function. . . . There is no justification for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.[1]

This decision turned on the issue of compliance with statutory requirements for a full investigation and did not reach constitutional proportions. The court specifically declined to pass upon the many constitutional questions raised by Kent's attorney. The major issues which the lower court had to determine at the de novo hearing were whether counsel had had an adequate opportunity to function and whether the court had in fact considered all items material to the question of whether waiver should be granted. In terms of the standards to be used in future waiver proceedings, the points mentioned by the Supreme Court include the following: seriousness of the offense; evidence of premeditation; offenses against persons rather than property; prospective merit of complaint; and juvenile maturity.

In support of the court order and as a guide to the lower court, Justice Fortas dealt at some length with the

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[1] Kent v. U.S., 383 U.S. 541, 561 (1966). This was a 5-4 decision with Justices Fortas, Brennan, Clark, Douglas, and Warren in the majority, and Justices Black, Harlan, Stewart, and White dissenting. The four dissenting justices did so on the grounds that because Black and Watkins had been decided since the circuit court's decision in Kent v. Reid, the case should be remanded to the court of appeals for reconsideration in the light of those cases. Justice Stewart, writing for the minority view, expressed no opinion as to the merits of the substantive points raised by the majority.

procedures he though necessary at a waiver hearing. He wrote:

> . . . [T]here is no place in our system of law for reaching a result [transferral to criminal court] of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.[1]

The fact that the youth would be subjected to the death penalty in criminal courts, as opposed to a maximum confinement of five years in juvenile court, was specifically cited as evidence of the critical nature of waiver proceedings.

Writing of procedures in waiver proceedings, Justice Fortas forcefully supported the view that the right to counsel is of fundamental importance to juveniles:

> The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to a denial of counsel.[2]

Although this reference was to juvenile court procedures in the District of Columbia, the court's message on the need for procedural regularity and fairness in juvenile courts seems, in retrospect at least, quite clear. Particularly

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[1] Ibid., p. 554.

[2] Ibid., p. 561. Emphasis added.

in light of the opinion in Gideon v. Wainwright,[1] there appears to have been considerable doubt that future denials of the basic constitutional protection to a meaningful right to counsel would be permitted even accepting the non-criminal basis of juvenile courts.

Combining the Supreme Court's then recent decision expanding the right to counsel under the "due process" clause of the Fourteenth Amendment, and the dicta in Kent on the importance of counsel in waiver proceedings, one is left with the inescapable conclusion, albeit via hindsight, that juvenile court action would soon be reviewed in full by the Supreme Court. Indicators that a full scale review of juvenile court procedures might be forthcoming were also in evidence from Justice Fortas' comments about their goals and achievements. He noted that although the entire structure of juvenile courts was rooted in "social welfare philosophy" rather than in the "corpus juris," the state did not, while acting as parens patriae, possess authority for arbitrary action even though the care and rehabilitation of the child be the stated goals. It may have been prophetic that while he noted the general practice of referring to juvenile courts as "civil" and not "criminal" in nature, he did not indicate the Supreme Court's acceptance of this interpretation.

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[1] 372 U.S. 335 (1963).

The Fortas decision reveals quite clearly that the semantics of non-criminal proceedings of a delinquency nature, when penetrated, contain some facts that were difficult to accept. Note for example the following:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purposes to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.[1]

Certainly such words, even though accompanied by a disclaimer of constitutional import in this case, did not escape interpretation as "handwriting on the wall" in terms of future reviews by the court.[2] Justice Fortas was obviously concerned that juvenile courts had not lived up to the rhetoric of their supporters. Kent was a warning of growing impatience by the Supreme Court with highly informal, often irregular procedures in juvenile courts.

In re Gault

Although it might have been desirable that juvenile courts would have appreciable time in which to reform them-

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[1] Kent v. U.S., 383 U.S. 541, 554 (1966).

[2] See Daniels W. McLean, "An Answer to the Challenge of Kent," American Bar Association Journal, LIII (May, 1967), 456-457, and Robert Gardner, "The Kent Case and the Juvenile Court: A Challenge to Lawyers," American Bar Association Journal, LII (October, 1966), 923-925.

selves in order to meet the specific and implied challenges of Kent, this was not to be. Within little more than a year, on May 15, 1967, the Supreme Court handed down its decision in In re Gault.[1] Unlike the Kent case, Gault arose out of a state juvenile court decision and was concerned with the delinquency adjudication procedures broadly viewed. The case requires detailed consideration.

Gerald Gault had been taken into custody by the sheriff of Gila County, Arizona, on the complaint of a neighbor who alleged that he and a friend had made an obscene telephone call to her.[2] He was taken to the detention home and detained for the remainder of the day. No attempt was made to notify his parents, who learned of their son's detention through a friend. Upon going to the detention home they were verbally told that a hearing would be held the next day. A deputy probation officer and superintendent of the home filed a delinquency petition the day of the hearing. It was not served on the Gault family. No specific charges were set forth, rather it was merely contended that Gerald Gault was in need of protection by the court.

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[1] 387 U.S. 1 (1967).

[2] Much of the material dealing with the facts of this case were taken from Justice Fortas' description of the events. Ibid., p. 3-12. For further examination of the specific events in this case, see B. James George, Jr., Gault and the Juvenile Court Revolution (Ann Arbor, Michigan: Institute of Continuing Legal Education, 1968), pp. 29-31.

At the initial hearing only Gerald, his mother, his older brother, two probation officers, and the juvenile court judge were present. Mrs. Cook, the complainant, was not present. No sworn testimony was taken. No transcript or memorandum of the proceedings was prepared. Although conflict exists as to the exact nature of Gerald's statements at that hearing, he apparently did admit involvement in the affair of the telephone call. At the conclusion of the hearing, the judge said he "would think about it" and had Gerald returned to the detention home where he remained for two days before being released to his parents.

A second hearing was held within a week. The Gault family was informed by a brief note from a probation officer of its scheduled time. Although Mrs. Gault asked that the complainant be present, the judge denied this request, saying it "wasn't necessary." The probation officer reported that he had talked with Mrs. Cook once over the telephone at which time she described the event. The probation department gave the court a "referral report" which was not made available to the Gault family. It listed the charge of making "lewd phone calls." At the conclusion of the hearing Gerald Gault was committed to the state industrial school for the period of his minority, a maximum of six years, unless sooner discharged by law. Had he been an adult he could have been fined $5 to $50, or imprisoned for not more than two months.

Because no appeal was permitted in juvenile cases under Arizona law, the Gault family filed a petition for a writ of habeas corpus with the Arizona Supreme Court. This petition was referred to the superior court for hearing. There the juvenile court judge was questioned by Gault's counsel, who had not been present at either of the two delinquency hearings. The judge testified that he had taken into account the fact that Gerald was already on probation at the time of the call to Mrs. Cook, and that he remembered that the youth had been involved in the theft of a baseball glove several years earlier, although there was "no hearing" and "no accusation" relating to this incident. The superior court was apparently satisfied with this explanation and dismissed the writ. The Gault family then again sought relief in the Arizona Supreme Court.

A few months later, about seventeen months after the commitment, the highest court in Arizona rendered a decision of its own on Gerald Gault's petition for a writ of habeas corpus.[1] In essence the court denied petitioner's claims that the Arizona statute relating to the adjudication of juvenile delinquents was unconstitutional because it failed to appraise parents and children of specific charges, did not require notice, and did not provide for an appeal. Petitioners also argued that the juvenile court had in fact

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[1] Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

denied them due process of law by failing to provide proper notice, failing to notify the parents and the juvenile of their constitutional rights, relying upon unsworn testimony, and failing to make a record of the proceedings. These claims were also denied.

Relying upon the precedent of many earlier decisions, the court noted that Gerald's parents knew the exact charge against him even though it was not spelled out formally, that notice was provided for by the Arizona statute and was given in this case by the probation officer's note to Mrs. Gault, that there is no constitutional or statutory right of appeal or right to a record, that the right to confront witnesses arises only when the charges are denied, that the juvenile court did not have to advise the juvenile of a privilege against self-incrimination, and, lastly, that due process does not require the right to counsel in juvenile proceedings because the parent and probation officer may be relied upon to protect the child's interest and further that when the court discerns a conflict, it has the authority to appoint counsel. In so holding, the Arizona Supreme Court took note of the growing criticism of juvenile court practices, but it specifically rejected claims that the full force of criminal protections were applicable in delinquency proceedings.

The United States Supreme Court heard oral arguments in the ensuing appeal on December 16, 1966, some eleven

months later.[1] Monrad Paulsen accurately predicted the importance of this case before it was finally decided and forewarned juvenile courts that the Supreme Court would add a new dimension to the right to counsel protection.[2] This was, however, only one of the points on which counsel for the appellants urged reversal.

Appellants also urged that the Arizona statute be declared unconstitutional on its face as contrary to the due process clause of the Fourteenth Amendment in that it provided structures by which juveniles could be taken from their parents and committed to an institution with virtually unlimited court discretion. They further argued that six specific rights were denied: (1) notice of charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) privilege against self-incrimination; (5) right to a transcript of the proceeding; and (6) right to appellate review. In the oral argument Norman Dorsen of New York University Law School appeared for the appellant, with Frank Parks, Assistant Attorney General for Arizona, speaking for the appellee and with Merritt Green, spokesman for the Ohio Association of Juvenile Court Judges, as amicus

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[1] 384 U.S. 997 (1966).

[2] Monrad G. Paulsen, "Kent v. United States: The Constitutional Context of Juvenile Cases," in The Supreme Court Review, ed. by Philip B. Kurland (Chicago, Illinois: The University of Chicago Press, 1966), p. 187.

curiae. Spokesmen for various other organizations also presented briefs to the court.[1]

Justice Fortas was chosen once again to express the views of the Supreme Court and did so in a fifty-nine page opinion. Justices Black, White, and Harlan wrote separate opinions concurring in whole or part while Justice Stewart was the sole dissenter from the judgment. The first portion of the opinion by Justice Fortas contained a statement of the specific facts of the case and described earlier court action in Arizona. After noting the specific points raised by the appellant, Justice Fortas presented a well-documented discussion of juvenile courts in general, while laying the groundwork for consideration of the issues at hand. He included an historical review of juvenile courts and the goals of the reformers. Lack of resources in juvenile courts was noted, with the clear indication that such shortcomings helped explain why rhetoric was not matched by performance.

In a reference to parens patriae authority, Justice Fortas wrote:

> The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juv-

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[1]In addition to the Ohio Association of Juvenile Court Judges which argued for affirmance, there was filed amicus curiae briefs by the National Legal Aid and Defender Association urging reversal, the Legal Aid Society and Citizens' Committee for Children of New York, Inc. urging reversal, and the American Parents Committee of Washington, D.C. 18 L.Ed.2d 1522-1526.

> eniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child.[1]

Related to such doubts about the parens patriae concept was his questioning of the "civil," as opposed to "criminal," nature of juvenile courts. His discussion made it obvious that cloaking the proceedings as civil or non-criminal could not legitimately be a basis for denying fundamental rights.

There followed a weighing of actual rates of recidivism among juveniles against what might be hoped for from the juvenile court philosophy. It was concluded that the minimizing of constitutional protections had not resulted in reduced crime rates. Indeed, he felt that such paternalism, coupled with harsh dispositions, might actually have fostered deep resentment in the juvenile against all forms of authority. He hastened, however, to note that this view did not mean that all aspects of juvenile court proceedings had had undesirable results, but that the lack of formal procedural fairness had not in any discernable way had a positive effect. Efforts to protect the juvenile from the stigma of court adjudication were seen as both praiseworthy and completely within the realm of permissible action.

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[1] In re Gault, 387 U.S. 1, 16 (1967).

Justice Fortas then proceeded to a comparison of the results of juvenile and criminal court action in terms of their dispositions. He thought it to be of no constitutional significance that the institutions to which juveniles may be committed are called industrial schools rather than prisons. For the juvenile committed to such a school, it is a prison restricting his action and daily living. Regarding informalities generally and the duration of the confinement, Justice Fortas wrote:

> The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.[1]

Justice Fortas thus generally reaffirmed the spirit of the Kent opinion and then specifically rejected the rhetoric surrounding juvenile court aims, referring to it as "verbiage."

In turning to the specific issues before the court for determination, the opinion first dealt with the appellant's claim that adequate notice had not been provided. Agreeing with the appellant, it was concluded that:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to

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[1] Ibid., p. 29.

> prepare will be afforded, and it must "set forth the alleged misconduct with particularity.[1]

Notice, it was thought, should have been given for the initial hearing as well as for the second because each was a hearing on the merits. It was ruled that the notice should have been given in writing, contain the specific charge to be considered at the hearing, and, in any event, be provided sufficiently in advance to permit preparation of a refutation. On the issue of waiver of this right to adequate notice, it may be assumed that to be effective the waiver must be done intelligently and with a full understanding of the consequences of such action.[2] There was no indication that the Gault family knowingly waived their right to notice.

Appellant's claim that the youth was denied due process of law because he was not advised of his right to counsel was next considered. Justice Fortas expressed doubts that the role of the probation officer was such that he could adequately protect the rights of the juvenile at the delinquency hearing. As the arresting officer in many cases, as well as the supervisor of the detention home in this case, and as the functionary whose duty it is to file a petition of delinquency, the probation officer can hardly be expected to act as fully as may be desirable on behalf

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[1] Ibid., p. 33.

[2] See George, Gault, p. 34.

of the juvenile at the hearing. Nor, concluded Justice Fortas, can the judge fulfill this duty. Citing Powell v. Alabama[1] and Gideon v. Wainwright,[2] he wrote:

> A proceeding where the issue is whether the child will be found to be "delinquent" and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. . . . [W]e hold now that it [assistance of counsel] is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.[3]

It followed from this that whenever the juvenile's freedom may be curtailed in a delinquency hearing, the child and his parents must be notified of their right to be represented by counsel retained by them, and that if they are indigent, counsel must be appointed by the court. The fact that Mrs. Gault knew she could be represented by a lawyer was held not to have relieved the court of the duty of advising her of that right. Her failure to request or engage a lawyer could not properly constitute intentional waiver of that right.

Confrontation, self-incrimination and cross-examination were the issues next discussed. Appellant had argued that Gerald Gault's privilege against self-incrimination was not

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[1] 287 U.S. 45 (1932).

[2] 372 U.S. 335 (1963).

[3] In re Gault, 387 U.S. 1, 36-37 (1967).

adequately protected[1] and that, apart from his admissions, the finding of delinquency was based on hearsay testimony which ignored the rights of confrontation and cross-examination.[2] Taking first the claim that the admission against the accused's interest had been obtained in an unconstitutional manner, Justice Fortas noted that the recent decision in Miranda v. Arizona[3] required the court to consider whether, if the privilege against self-incrimination is available in juvenile court, it can be effectively waived without benefit of counsel. After noting the special vulnerability attaching to the status of juvenile, and describing the privilege against self-incrimination as designed not only to avoid unreliable confessions but also to prevent the state from overpowering an individual's free will, Justice Fortas held:

> It would be indeed surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive.[4]

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[1]This privilege was made applicable to state proceedings via the due process clause of the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1 (1964).

[2]This right was made applicable to state proceedings via the due process clause of the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

[3]384 U.S. 436 (1966).

[4]In re Gault, 387 U.S. 1, 47 (1967).

Anticipating critics' arguments that the Fifth Amendment protection refers to "criminal cases," he observed that the results of juvenile court action may have consequences that cannot legitimately be called other than criminal in effect. The privilege was held not to be limited to proceedings which are labeled as criminal; rather, its availability is to be determined by the nature of the statement or admission and the exposure resultant therefrom. Justice Fortas recognized that special problems might exist with respect to waiver of this privilege by juveniles,[1] and said that juvenile court techniques might differ somewhat from adult courts, but he did not go into detail on this point. Apparently the juvenile and his parents must be advised of the privilege at some point in the processing of the accused delinquent.[2] If waiver of the privilege is forthcoming without benefit of counsel, "the greatest care must be taken to assure that the admission was voluntary . . . and reliable."[3] Other than this somewhat vague admonition to juvenile courts, there were no standards laid down as to

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[1]This may be due to the question of whether a juvenile possesses the legal capacity to act intelligently in the matter. Similar problems arise in connection with mentally ill persons accused of crimes.

[2]See George, Gault, pp. 35-37, and Norman Lefstein, Vaughn Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice; Gault and Its implementation," Law and Society, III (May, 1969), 517-518.

[3]In re Gault, 387 U.S. 1, 55 (1967).

what constitutes valid waiver of the privilege against self-incrimination. Although the area of permissible waiver was thus narrowed, the court was not prepared to strike from juvenile delinquency proceedings all confessions obtained without benefit of counsel.

Proportionately far less space was devoted in the opinion to the issue of confrontation and cross-examination than was given to the privilege against self-incrimination. The outcome, however, was the same for both. Justice Fortas wrote:

> No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.[1]

Because in the present case there was no valid confession and no sworn testimony from witnesses available for cross-examination, it followed that the adjudication as a delinquent was improperly based. Although no specific reference was made at this point in the opinion to the juvenile court judge's denial of Mrs. Gault's request that the complainant be present, the use of allegations made by such complainant who did not become subject to cross-examination was quite clearly viewed as error whether or not a request was made

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[1] Ibid., p. 56.

for the complainant to appear at the hearing.

It may be speculated that had there been a valid confession in the case this would have rendered immaterial any denial of a right to confront and cross-examine witnesses. Caution should, however, be observed in reaching any such conclusion if only because in criminal law there appears to be rules which require some evidence giving collateral support to a confession. Note, for example, the language used in Pointer v. Texas,[1] which is cited in Gault as the basis of the ruling on the confrontation and cross-examination issue:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

In the final portion of the Gault decision Justice Fortas discussed the issues of appellate review, right to a transcript of the proceedings, and whether the failure of the juvenile court to provide reasons for its conclusion constituted error. Because the Arizona Supreme Court was reversed on other grounds, these points were not directly ruled upon. Justice Fortas did, however, note that the Supreme Court had not previously interpreted the federal Constitution as absolutely requiring an opportunity for

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[1] 380 U.S. 400, 405 (1965).

appellate review and was not so ruling here. Concerning the use of a transcript of juvenile court proceedings, he did comment that without such a record, and absent statutory provision for appeal, there is a strain placed upon the machinery for habeas corpus because of the need to rebuild the record. This comment would seem more in the way of a suggestion for improvement of procedures than a warning of future constitutional hurdles.

As to the question of whether a statement of reasons for action by the juvenile court is necessary, Justice Fortas pointedly mentioned the holding in the Kent case to the effect that in waiver proceedings the juvenile court in the District of Columbia was required to provide a statement of its reasons or considerations.[1] Although it is always risky to draw conclusions from such oblique references in Supreme Court decisions, one is left with the distinct impression that the court was seriously concerned because the Gault family had not been furnished with written reasons for the action of the juvenile court. Certainly, the absence of such a statement when taken in conjunction with the absence of any record at the hearings, may not only leave the interested parties in doubt as to the basis for the juvenile judge's decision, but seriously impede review by a higher court, whether on appeal or by

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[1] Kent v. U.S., 383 U.S. 541, 554 and 561 (1966).

habeas corpus. Whether future developments in this area are forthcoming remains to be seen, but if the ruling in Kent is applied to state juvenile courts, it should not come as a totally unexpected holding.

The majority opinion may be accepted as speaking fully not only for Justice Fortas but for the other four members of the court who filed no separate opinions. On the other hand, the specific views of those four judges who wrote individual opinions constitute additional facets of the case. Justice White, in the briefest of the separate opinions, concurred with the result of the case ordering a reversal of the delinquency adjudication, but dissented from the view that Gerald Gault's privilege against self-incrimination had been violated. He agreed that the Fifth Amendment privilege is applicable to juvenile court proceedings, but felt that a showing of compulsion by the state was required before its violation can legitimately be claimed. He particularly objected to the use of the Miranda decision as a basis for consideration in this case. This was a double-barreled objection, being directed at both the substance of the relied upon holding relative to the admissibility in state criminal proceedings of confessions obtained without previous warnings of constitutional privileges and protections, and to the fact that the delinquency adjudication in Gault took place in 1964, approximately two years before the Miranda decision. On similar

grounds, he would not have reached questions of confrontation and cross-examination.

Justice Black's concurring opinion is instructive not only because it illustrates his views on the issues surrounding juvenile courts, but also in that he provides a concise statement of his reasons for supporting the incorporation of the Bill of Rights into the Fourteenth Amendment making them applicable directly upon the states. Although he would have preferred to defer some of the issues for later consideration, saying this decision "strikes a well-nigh fatal blow to much that is unique about juvenile courts . . ."[1] he nevertheless did not leave his views unexpressed. Justice Black rejected the description of juvenile courts as non-criminal and referred to the so-called "industrial schools" as penitentiaries in all but name. He thought that such confinement, in this case for six years, cannot constitutionally be ordered without providing the accused with the procedural guarantees in the Bill of Rights. Gerald Gault, in this view, was unconstitutionally dealt with not because fundamental fairness was violated, but because the procedures in his case violated the specific provisions of the Fifth and Sixth Amendments to the federal Constitution as made operative against the states by the Fourteenth Amendment. Justice Black also

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[1] In re Gault, 387 U.S. 1, 60 (1967).

noted the points of difference between his views and those of Justice Harlan:

> He [Justice Harlan] believes that the Due Process Clause gives this Court the power upon weighing a "compelling public interest," to impose on the States only those specific constitutional rights which the Court deems "imperative" and "necessary" to comport with the Court's notions of "fundamental fairness."[1]

Reasoning of this variety is unacceptable to Justice Black who believes such views give to the courts unbridled arbitrary authority to read into the Constitution their own personal, political, social, or economic predelictions. Black's vote for reversal was on grounds that specific constitutional protections were violated, not because the proceeding was unfair. He did not specifically accept or reject the majority opinion's rationale.

Justice Harlan's separate concurring opinion consists primarily of an indirect refutation of Justice Black's incorporation theory, and a statement of his own position. After a brief introduction concerning juvenile courts Justice Harlan's opinion chides the majority for not making its standards clear. He accused the majority of weakening the constitutional base of juvenile courts without presenting an acceptable constitutional premise for such an attack. For Justice Harlan, the proper approach was to determine

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[1] Ibid., p. 62. For a discussion of the controversy between Justice Black and Justice Harlan on this point, see Orman W. Ketcham, "Commentary: What Happened to Whittington?" George Washington Law Review, XXXVII (December, 1968), 339.

whether the delinquency proceedings satisfied the requirements of the Fourteenth Amendment that property or liberty not be taken without due process of law. Thus his primary difference with the majority perspective rests upon the method used to determine whether due process has been denied. His method would be to refer to the probelms confronted by the state and to the character of the procedural system to see if it operates in a manner consistent with the "traditions and conscience of our people."[1] This view, not expressed by him here for the first time,[2] would require a balancing of the needs of the state against the procedural interests and protections of the individual subjected to state authority, and in this respect be less dogmatic than insistence that certain procedures be adhered to without qualification.

Three criteria were advanced by Justice Harlan for a defensible appellate decision in the instant case: (1) the court's restrictions should be limited to requiring "fundamental fairness;" (2) be designed to preserve so far as possible the essential aims of the state; and (3) permit later additions if these be proven necessary. He would, at the same time, have required three procedural modifications in delinquency proceedings: (1) insistence that timely

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[1] In re Gault, 387 U.S. 1, 67 (1967).

[2] See Barenblatt v. U.S., 360 U.S. 109, 125-134 (1959) for further examination of this "balancing test."

notice be provided; (2) advisement of right to counsel and appointment of counsel where indigency otherwise prevents his appearance; and (3) the maintenance of a record of the proceedings adequate to permit review on appeal or in collateral proceedings. He then concurred in the order of reversal on the limited grounds that there had not been adequate notice, advisement of right to counsel, or a satisfactory record. He did not reach the questions of confrontation, cross-examination, or self-incrimination.

The only dissent from the majority's decision to reverse was given by Justice Stewart. Refusing to be caught in the polemic concerning the issue of the criminal or civil nature of juvenile courts, he merely labeled them as "not adversary" proceedings designed to correct a condition, not to punish an act. Although he recognized the many faults in the system of juvenile justice, such awareness did not lead him to conclude that specific constitutional protections need be applied. He was concerned lest the results of such specific application of the Bill of Rights be a return to the procedures used in the last century under which juveniles were dealt with under a fashion identical with that existing for adults accused of crime. The specific basis for his dissent from the order of reversal was the belief that inflexible insistence that all juvenile courts adhere to restrictions applicable to adversary criminal trials was both unwise judicial policy and unsound constitutional law.

Highly respected and prolific writers in the field of juvenile justice have referred to the Gault decision as "revolutionary" and calling for fundamental re-evaluation of juvenile courts.[1] Although some might question the propriety of using the term "revolutionary," there can be no soundly based refutation of the conclusion that the decision requires major modifications in many juvenile court procedures.

In order to maintain a proper perspective, it is useful to note the limits of the Gault case. Very early in the opinion Justice Fortas made it clear that delinquency-determining steps, and not also the intake and dispositional phases of the procedure, were being ruled upon:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile to the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.[2]

This was reiterated at a later point in the following words:

> . . . [W]e emphasize again that we are here concerned only with a proceeding to determine whether

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[1]For example, see Orman W. Ketcham, "Guidelines from Gault: Revolutionary Requirements and Reappraisal," Virginia Law Review, LIII (December, 1967), 1700-1718, and Monrad G. Paulsen, "The Role of Juvenile Courts," Current History, LIII (August, 1967), 70-75.

[2]In re Gault, 387 U.S. 1, 13 (1967).

> a minor is a "delinquent" and which may result in commitment to a state institution.[1]

In sum, the Gault decision encompassed only the adjudicatory phase of delinquency hearings in which there was a possibility of commitment. Because, however, all juvenile court statutes provide for such commitments of youths adjudged delinquent,[2] few if any juvenile courts in the nation could ignore the Gault holdings.

Summarizing the rulings in Gault is quite a simple task when compared with efforts to apply its doctrine fully in a program that would revise delinquency proceedings to build in an assurance of acceptability to the nation's highest court. On some points there covered no confusion exists, but on others the requirements were far from clear, and there was, of course, the likelihood of future modifications and expansions by the Supreme Court of the protections required for youths in juvenile court. By way of further background for what has actually materialized in the juvenile court reform movement, some of the more common issues of interpretation that the Gault decision promptly provoked may be noted.

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[1] Ibid., p. 44.

[2] For a discussion of the varieties of commitment procedures in the United States, see Frederick B. Sussmann and Frederick S. Baum, Law of Juvenile Delinquency (3rd ed. rev., Legal Almanac Series No. 22; Dobbs Ferry, New York: Oceana Publications, 1968), pp. 47-48.

In the first place, there is even disagreement as to whether Justice Fortas characterized juvenile courts as "criminal" in nature.[1] This is a critical issue if only because the burden of proof in criminal cases is quite different from that applying in other litigation. Further, if he had so labeled delinquency proceedings as basically a criminal proceeding it would follow that the requirements of the Miranda decision, guarding against anything amounting to coerced confessions in criminal cases, would be applicable to delinquency hearings. One commentator wrote:

> The Gault opinion itself leaves little doubt that the warnings and privileges afforded by the . . . Miranda decision to persons in custody after arrest must be given to juveniles. There would seem to be no valid reason for denying the assistance of counsel to the youth at the investigatory stage since he is certainly more susceptive to psychological coercion than is an adult.[2]

A similar view was also expressed about the applicability to delinquency proceedings of Mapp v. Ohio[3] relating to the admissibility of evidence obtained in an unconstitutional search of an accused person and seizure of his property.

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[1]Compare George Davidson, "In re Gault: The Juvenile's Gideon," Illinois Bar Journal, LVI (February, 1968), 498, with William J. Linklater and Robert J. Zana, "Constitutional Law - Due Process - Juvenile Courts: Specific Due Process Guarantees Extended to Accused Delinquents in State Juvenile Court Proceedings," Illinois Bar Journal, LVI (December, 1967), 329.

[2]Linklater and Zana, "Constitutional Law," p. 329. For further discussion, see Richard Seaton, "Juveniles and the Emerging Law," in Juvenile Delinquency: Prevention and Control, ed. by William H. Cape (Lawrence, Kansas: Governmental Research Center, 1969), pp. 40-44.

[3]367 U.S. 643 (1961).

Other questions widely discussed include the entitlement of the juvenile in the adjudicatory phase to bail, grand jury indictment, and a jury trial.

As to neglect and dependency cases there is some question about the consistency of Justice Fortas' comment to the effect that they were excluded from the purview of the Gault ruling. This problem arises when it is remembered that some state laws have in the past provided the same dispositions, including commitment, for dependent and neglected children as for delinquents. Where this situation still exists would the provisions of the Gault decision be applicable? An affirmative answer would seem to be required if the commitment was to an institution designed primarily for juvenile criminals or delinquents.

Another much discussed point arises from Justice Fortas' citing with approval a requirement that indigents in criminal cases be freely supplied with a copy of any court record necessary for adequate appeal,[1] but then declining to reach the issue of a right to a record of the proceedings in the case at hand. Does this mean that where the right of appeal based on the record below has been given by statute in juvenile proceedings, there is required

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[1]See Griffin v. Illinois, 351 U.S. 12 (1956).

a transcript to be made and, for indigents, to be furnished without charge?

There is a general understanding that the main requirements immediately made applicable to delinquency proceedings by the Gault decision were: adequate notice of impending proceedings; advisement of right to legal representation regardless of ability to pay for such service; exclusion of inculpatory statements made by the youth without a warning by the court of the privilege against self-incrimination; and protection of the right to confront and cross-examine persons providing evidence helping to substantiate the charge of delinquency.

Post-Gault Action

Insufficient time has elapsed for most of the above and other issues that could be enumerated to come before the federal Supreme Court, but there have been some post-Gault decisions by that court which provide further guidelines as to what constitutes valid delinquency proceedings.

Whether the Gault requirements would have only prospective application or be retroactive in their effect is one item on which the high court has since spoken. Generally, with the notable exception of the Gideon case relating to the right to counsel in state criminal proceedings, expansions of the protections within the meaning of the

due process clause of the Fourteenth Amendment have had only prospective application.[1] The Gault decision itself made no reference to whether its provisions applied retroactively or only prospectively. If the analogy to adult proceedings is maintained, then juveniles adjudged delinquent prior to the Gault decision, without being told of their right to counsel and to have one appointed if they could not afford one, would seem to have been denied due process of law. Because the great majority of juvenile court hearings prior to Gault were conducted in a manner not meeting the requirements of that case, this interpretation would invalidate a large percentage of all juvenile court delinquency adjudications.

Against a background of conflicting state appellate court decisions,[2] the federal Supreme Court partially resolved this issue in the case of In re Whittington,[3]

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[1]For a general discussion of retroactivity, see James Webster, "Criminal Law - Juvenile Courts - In re Gault Held to Have Retroactive Effects so that Juveniles Convicted Without Representation by Counsel are Entitled to New Trial," Notre Dame Lawyer, XLIV (October, 1968), 158-165, and for a more limited but useful series of comments, see George, Gault, pp. 38-39, Ketcham, "Commentary," pp. 330-331, and Dan Hopson, Jr., "Symposium on Juvenile Problems: In re Gault, Introduction," Indiana Law Journal, XLIII (Spring, 1968), 549-550. See also Desist v. U.S., 394 U.S. 244 (1969), and 22 L.Ed.2d 821.

[2]For example, see Application of Billie, 103 Ariz. 16, 436 P.2d 130 (1968) holding Gault retroactive. Contra. Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967).

[3]391 U.S. 341 (1968).

permitting limited retroactivity. In a per curiam decision the court brushed aside the substantive issues on right to bail, proof beyond a reasonable doubt, right to a jury trial, and the right to be warned against self-incrimination, and merely attempted to unravel the highly tangled procedural problems involved in this case. Buddy Whittington had been adjudged delinquent on September 2, 1966 and had his adjudication upheld in an appeal to the Ohio Supreme Court two months prior to the Gault decision. On April 11, 1967 the federal Supreme Court granted certiorari[1] but shortly thereafter he was bound over to adult criminal court in Ohio, and indicted for first degree murder. In a brief opinion the Supreme Court assumed that an adjudication of delinquency, even absent a final disposition, was an appealable order, and accordingly vacated the Ohio Supreme Court affirmation and remanded the case to the Ohio Court of Appeals for further consideration in the light of the Gault decision. Although no substantive issues were dealt with, this decision indicated the Supreme Court's willingness to consider the provisions of the Gault case as retroactive, at least in those cases where the disposition had not become final prior to May 15, 1967, the date of the Gault decision. Whether a similar conclusion would have been reached if the juvenile court had rendered a final disposition is speculative, but it is clear that for those rapidly diminishing

[1] 389 U.S. 819 (1967).

number of cases decided before Gault but not given final disposition, the provisions of Gault are applicable. Justice White, joined by Justice Black, dissented from this decision because, as they saw it, there had not yet been a final judgment in Ohio from which any appeal could be taken to the U.S. Supreme Court, and because there was an appeal before the courts in Ohio on the waiver of juvenile court jurisdiction, thus rendering the case beyond the appellate jurisdiction of the federal high court.

The U.S. Supreme Court has refused retroactive application to delinquency proceedings of a holding, applicable to criminal cases, extending the right to a jury trial.[1] One cannot, however, overlook the fact that Justices Black and Douglas dissented from this opinion, arguing separately that not only should the Supreme Court abandon the prospective approach to implementation of new interpretations of the Constitution, but also that substantively this case should have been decided in favor of appellant. There are, consequently, at least two justices on the Supreme Court who entertain the view that a right to a jury trial exists in juvenile delinquency proceedings.

The most recent decision by the Supreme Court directly relating to juvenile courts came in March, 1970, in the

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[1] DeBacker v. Brainard, 396 U.S. 28 (1969)

case of In the Matter of Winship.[1] Justice Brennan, writing for the majority, first declared that the "proof beyond a reasonable doubt" test is constitutionally mandatory in criminal trials under the due process clause of the Fourteenth Amendment, and then concluded that juvenile courts must apply the reasonable doubt standard in delinquency hearings. Further attention is given to this decision at a later point, when delinquency procedures and their reform are treated comprehensively.

On December 9 and 10, 1970 the U.S. Supreme Court heard oral arguments on two delinquency cases each involving the issue of a right to jury trials in delinquency proceedings.[2] At this writing no decision has been rendered in either of these cases.

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[1] 397 U.S. 358 (1970).

[2] In re Burrus, No. 128, and McKeiver v. Pennsylvania, No. 322, Criminal Law Reporter, December 16, 1970, vol. 8, pp. 4088-4092.

CHAPTER IV

JUVENILE COURT JURISDICTION

The operation of our juvenile courts, and especially the way in which they handle delinquency cases, may now be examined in detail in the light both of the hopes of the early reformers of justice as applied to young people and of subsequent realities, including in the latter the aftermath of Gault. While developments in other large states, particularly California and New York will not be ignored, the emphasis will center upon Illinois -- the pioneer in the early days of the juvenile court movement and a state which has revised the structure and workings of its juvenile justice machinery so as to be reasonably abreast of the times. Its experience alone is sufficient to provide a panorama of developments and continuing problems that can hardly be unrepresentative of the nation as a whole.

The Administering Tribunals

A brief review of the action taken by the Illinois legislature seems necessary to provide an orientation to the subsequent issues to be considered. The 1899 Illinois juvenile court act, though changed in name in 1949[1] and amended on many occasions, was not comprehensively revised

[1] Laws of Illinois (1949), p. 395.

until 1965 when an entire new act was written.[1] This act has been supplemented by legislation establishing an Illinois Youth Commission[2] which in 1970 became part of the Illinois Department of Corrections.[3] Other legislation includes approval of the Interstate Compact on Juveniles,[4] provisions for state operated schools for juveniles,[5] and

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[1]For a discussion and useful summary of the repealed family court act, see Benjamin E. Novoselsky, "The Family Court Branch of the Circuit Court," Chicago Bar Record, XXXVII (May, 1956), 347-362, and Jerome S. Weiss, "The Illinois Family Court Act," University of Illinois Law Forum, LXII (Winter, 1962), 533-556. For a summary of the act proposed in 1965 see William M. Trumbull, "Proposed New Juvenile Court Act for Illinois," Illinois Bar Journal, LIII (March, 1965), 608-619, and Harry L. Pate, "The State Council and the Juvenile Court Act," Juvenile Court Judges Journal, XVIII (Spring, 1967), 20-22. For a concise discussion of the events leading up to the appointment of a Citizen's Committee on the Juvenile Court which made recommendations concerning the Cook County Family Court, see Robert H. MacRae, "The Role of a Citizen's Committee," Juvenile Court Judges Journal, XVIII (Spring, 1967), 5-8, and for the study and recommendations of the Citizens Committee, see The Cook County Family (Juvenile) Court and Arthur J. Audy Home: An Appraisal and Recommendations by the National Council on Crime and Delinquency for the Citizens Committee on the Family Court (Chicago, Illinois: National Council on Crime and Delinquency, 1963), and the subsequent Report of the Citizens Committee on the Family Court (Chicago, Illinois: The Citizens Committee on the Family Court, 1963). For a summary of proposed statutory revisions of the family court act, see Illinois, Commission on Children, Biennial Report 1965 (Springfield, Illinois: Commission on Children, 1965), pp. 12-17.

[2]Ill. Rev. Stat. (1953), c. 23, sec. 220d.1.

[3]Ill. Rev. Stat. (1969), c. 23, sec. 2501.

[4]Ibid., sec. 2591.

[5]Ibid., sec. 2601, sec. 2621, and sec. 2651.

provision for county detention homes.[1] Thus, the Illinois juvenile court act is only one aspect of a broad program to provide regularized procedures for handling juveniles who have run afoul of, or need the protection of the law.

The early Illinois pattern of juvenile court authorizations necessarily underwent change after a constitutional amendment,[2] adopted in 1962, wrote into the state's fundamental law new specifications regarding its judiciary, including a consolidation of all local courts in any area into a single circuit court. Prior to the 1962 amendment, authority to hear cases arising from the juvenile court act, or family court act as it was known from 1949 to 1965, was given to the circuit and county courts of Illinois.[3] In Cook County the judges of the circuit court were empowered

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[1] Ibid., sec. 2681.

[2] For a comprehensive study of this constitutional amendment, see James A. Gazell, "Judicial Consolidation in Illinois: An Eclectic Study" (unpublished Ph.D. dissertation, Southern Illinois University, 1968), and for a brief summary of Illinois judicial systems, see David F. Rolewick, A Short History of the Illinois Judicial Systems (Springfield, Illinois: Illinois Bar Foundation, 1968), and for a discussion of the 1962 judicial article and the now repealed family court act, see Margaret M. Eisendrath, "The Judicial Article and the Family Court," Chicago Bar Record, XLIII (June, 1962), 440-444.

Illinois in 1970 adopted a new Constitution which is scheduled to go into effect on July 1, 1971. It is beyond the scope of this study to examine the potential impact this document will have on Illinois juvenile courts.

[3] Ill. Rev. Stat. (1963), c. 23, sec. 2001.

to designate from their own ranks one or more judges who were to hear all cases coming under the act.[1] The result was that it was the circuit court that handled cases of delinquent, dependent and neglected children while elsewhere in the state, where circuit courts generally served more than one county, the juvenile court was a branch of the local county court.[2]

Under the revised judicial article, all juvenile matters requiring formal proceedings are heard in one of the twenty-one circuit courts which were given unlimited original jurisdiction in all justiciable matters.[3] Provision was made in the 1962 judicial article for specialized or general divisions within each circuit court at the discretion of the chief judge of the circuit. This made redundant the statutory provision for a juvenile division in Cook County because each circuit in the state now had this authority, and the provision was accordingly repealed in 1965.[4]

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[1] Laws of Illinois (1899), p. 132. This was part of the original statute and was maintained until 1965.

[2] Although the act gave original jurisdiction to local county and circuit courts, the common practice, outside of Cook County, was for the county judge to preside over the court when the juvenile court act was implemented. See Jurisdiction Over Juvenile Offenders (Illinois Legislative Council, Pubn. No. 54; Springfield, Illinois: Illinois Legislative Council, 1942), p. 4.

[3] Illinois, Constitution (1962 Amend.), art. VI, sec. 9.

[4] Ill. Rev. Stat. (1965), c. 23, sec. 2003.

A summary of the manner in which the various circuit courts have utilized the existing authority to create divisions appears below.[1] In Cook County and in seventeen of the twenty downstate circuit courts there is some such form of work specialization and of these thirteen have created a family or juvenile division. The three remaining circuits have not formally created divisional arrangements.

The single most important factor in the creation of a juvenile division seems to be population density. The Honorable Robert E. Hunt, Chief Judge of the Tenth Circuit, succintly stated this relationship as follows:

> The amount of specialization and division varies from county to county and depends entirely upon the population in the county, which in turn determines the work load of the courts in each court in all fields of endeavor. . . . Juvenile problems are in greater proportion than simply the relationships of population. . . . Density of population aggravates juvenile delinquency.[2]

Judge Hunt's analysis appears applicable beyond the Tenth Circuit, for eleven of the thirteen circuits having a

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[1]This information was obtained from responses to question one on questionnaires mailed to chief judges of the twenty circuit courts outside of Cook County. See Appendix on page 339, and from a structural summary of Illinois circuit courts prepared by the Administrative Office of the Illinois Courts in Springfield, Illinois entitled Court Divisions in the 102 Illinois Counties. For information on the divisions in Cook County, see below at page 149.

[2]Letter, Robert E. Hunt to the author, December 23, 1969.

CIRCUIT COURT DIVISIONS IN ILLINOIS

Circuit	Divisions
1	none
2	none
3	law, family, criminal, juvenile, probate, traffic
4	law, chancery, probate, criminal, traffic, small claims, family (juvenile included)
5	general, county, probate, magistrate
6	law, chancery, probate, criminal, traffic, quasi-criminal, small claims
7	law, chancery, criminal, magistrate, probate, domestic and family relations (juvenile included)
8	criminal, civil, misdemeanors, traffic, small claims, family (juvenile included)
9	general, county, magistrate
10	civil, criminal, magistrate, family (juvenile included)
11	general, probate, chancery, magistrate, family
12	general, criminal, magistrate, family
13	general, family, juvenile, probate, magistrate
14	general, county, probate, magistrate
15	none
16	civil, criminal, government, probate, chancery, magistrate, small claims, family
17	general, county, probate, magistrate, juvenile
18	general criminal, county, probate, magistrate
19	general, probate, magistrate, juvenile
20	civil, criminal, probate, tax, family

juvenile or family division contain at least one county with over 100,000 in population, and conversely, only two circuits with a juvenile or family division contain no county with over 100,000 in population.[1] Where juvenile delinquency constitutes a "serious" problem facing the courts, the likelihood of a special juvenile division increases and this factor seems directly associated with population density. Certainly other environmental factors such as socio-economic status, population growth, and community resources have an important role to play in the determination of a given area's delinquency problem but the close relationship between population density and increased specialization in the court structure is amply obvious. In those circuits composed of a number of sparsely populated counties, the common practice seems to be to have a de facto geographic division plan with a local judge or magistrate in each county handling juvenile court cases that arise in the county.[2] As other areas of the state increase in urban and suburban population, pressures for true area-wide juvenile divisions

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[1]The Fourth Circuit's most populous county is Marion County with just under forty thousand inhabitants in 1960, and the Eleventh Circuit's McLean County had just over eighty thousand. Illinois, Secretary of State, Illinois Blue Book 1967-68 (Springfield, Illinois: Secretary of State, 1968), pp. 836-837.

[2]As Judge Hunt said, ". . . [I]n the three smaller counties [of the Tenth Circuit] the Associate Judge simply has one general division in which he presides over all the work in his county . . ." Letter, Robert E. Hunt to author, December 23, 1969.

within the circuit courts will very likely increase if the usual pattern of higher delinquency rates occurs.

Presiding in the circuit courts are three varieties of officers: circuit judges; associate judges; and magistrates. Every county in a multi-county circuit is guaranteed at least one associate judge and one or more magistrates. These have the capacity, among other things to preside over cases arising under the juvenile court act although the responsibility for such assignment lies with the chief judge of each circuit court.[1] Magistrates have full status as judicial officers in their own right and all appeals from their decisions go to the appellate courts and not to a circuit or associate judge. Illinois has no statutory provision for the use of referees in the hearing of juvenile court cases[2] although such a practice has been found in the Cook County Juvenile Court.[3]

Judges and associate judges in Illinois must be licensed attorneys, and a similar rule is becoming quite firm with regard to magistrates. It is known that magistrates serve in juvenile court cases in at least three downstate circuits, and are selected for that duty by

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[1] Ill. Rev. Stat. (1969), c. 110A, sec. 295(e).

[2] For a discussion of the role of referees in juvenile courts, see Cal. Gov. Comm. Report Pt. II, pp. 28-29, Standards, pp. 77 and 105-106, and S.J.C.A., pp. 22-23.

[3] The Cook County Family (Juvenile) Court, p. 33.

rotation in two of the circuits and on the basis of special competence in the third. Such gleanings, however, do not suffice to shed much light on the amount of expertise possessed in downstate Illinois by those who preside in delinquency cases. Whether it be a judge, associate judge, or magistrate who presides, such special skills as he may have for juvenile cases typically come from on-the-job experience. As one judge has said of the process of designating a judge or magistrate to preside in the juvenile court:

> Selection was motivated by practical considerations of geography and availability. The luxury of other considerations is not open to us.[1]

One of the most common qualifications required by chief judges in selecting the presiding judge over the juvenile division was an interest in juveniles. There is in downstate Illinois seldom available to chief judges manpower with training or experience that would qualify them as experts in the field of juvenile justice.[2]

Cook County is faced with problems of a different nature in staffing its juvenile court. The sheer volume of caseload has long forced greater specialization in structure and made more common the presence at any one time of

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[1]Comment on questionnaire by Judge John T. Reardon, Chief Judge of the Eighth Circuit.

[2]For a discussion of such qualifications, see Cal. Gov. Comm. Report Pt. II, p. 29.

presiding judges and magistrates whose professional careers include more substantial experience and training than is possible in the more sparsely populated downstate jurisdictions. At present, the Cook County Circuit Court is divided into two departments, County and Municipal, with the former being further subdivided to reflect functional specialization while the latter includes six districts each covering a specified geographical area.[1] Included within the County Department is the juvenile division presided over by Judge William S. White.[2] In this division there are, in addition to the presiding judge, three associate judges and six magistrates. The various subdivisions in the juvenile division include delinquency, dependency, neglect, and minors in need of supervision, among others.[3]

From this brief sketch of the Illinois court structure as it relates to juvenile courts, it is evident that wide variation exists from one portion of the state to another. In many other states, too, juvenile court structures vary considerably in form and personnel as between the populous and less populous portions of the state.

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[1] Court Divisions in the 102 Illinois Counties, p. 2.

[2] Letter, John P. O'Brien, Director of Court Services for the juvenile division of the County Department of the Cook County Circuit Court, to author, January 29, 1970.

[3] The other divisions include violent delinquency, mental retardation, truancy, paternity, and collections. Typically one magistrate or associate judge is assigned two of these divisions.

Age Limits

Juvenile court legislation, like the criminal law, must handle the issue of the age groups to which it is to apply. In the criminal law, the critical question as to age limits is that of fixing a point at which the young person can reasonably be deemed sufficiently mature to be treated as one who knows right from wrong and can control his impulses accordingly. In juvenile court legislation, the same question arises in fixing a minimum age, while as to the maximum age the question is determining the point at which the adolescent may reasonably be treated in a fashion identical with that provided for adults.

The Illinois rules with regard to the age of criminal responsibility have, as elsewhere in the United States, been changed from time to time. At present, the boundary between absence and presence of criminal responsibility comes at the thirteenth birthday.[1] The state has abandoned a previous pattern in which there was an age below which immunity from criminal prosecution was complete and an

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[1] Ill. Rev. Stat. (1969), c. 38, sec. 6-1. In 1941 there was an effort to raise the age of criminal responsibility to fourteen years of age. The Governor, however, successfully opposed this move partly on the grounds that such action would encourage juvenile crime. See Jurisdiction Over Juvenile Offenders, p. 6.

intermediate age that had only a presumption against criminal capacity. Thus, in Illinois a child under thirteen committing an offense can be acted against only under the juvenile court law; a child attaining age thirteen but not beyond the maximum age of the juvenile court can be proceeded against either as a delinquent or a criminal; while a child above that last age can be prosecuted only as a criminal.

Illinois has declined to follow the national trend toward adoption of an upper limit of age eighteen as suggested by the Standard Juvenile Court Act.[1] Initially the Illinois law set the upper age limit up to sixteen for both boys and girls,[2] but raised it in 1905 to boys under seventeen and girls under eighteen.[3] This age limit applied to all three categories of juvenile court action: delinquency, dependency, and neglect. In 1955 another revision in the Illinois law on the matter of age jurisdiction was approved. Amending the family court act, the legislature retained the former delinquency jurisdiction for males and females at seventeen and eighteen respectively, but in dependency and neglect cases the age limit of juvenile, or

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[1] S.J.C.A., p. 10.

[2] Laws of Illinois (1899), p. 131.

[3] Laws of Illinois (1905), pp. 152-153.

family, court jurisdiction was fixed at eighteen for both sexes.[1] This breakdown was maintained in the 1965 revamping of the juvenile justice system in Illinois.[2] Added to the classification of persons subject to juvenile court jurisdiction was the category of "those otherwise in need of supervision," with the under eighteen maximum age rule being made applicable to them. The Illinois law has never had a specific minimum age limit. On the other hand, jurisdiction under its juvenile court law has never been exclusive, so that young persons above the age of criminal responsibility, now thirteen, and below the maximum age for delinquency jurisdiction, seventeen and eighteen respectively for boys and girls, may, depending on the circumstances, be treated either as delinquents or as criminals.[3] The Illinois Supreme Court has accepted these classifications based on age and sex as not denying any legal or constitutional rights.[4]

That the age factor in juvenile court legislation is an important consideration is clearly enunciated by the following statement:

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[1] Laws of Illinois (1955), p. 2094.

[2] Ill. Rev. Stat. (1965), c. 37, sec. 702-3, sec. 702-4 and sec. 702-5.

[3] Ill. Rev. Stat. (1969), c. 37, sec. 702-7(3). Transfer to criminal courts is discussed further at page 173.

[4] Jacobson v. Lenhart, 30 Ill.2d 225, 195 N.E.2d 638 (1964).

> Because all of the statutes make juvenile delinquency jurisdiction dependent upon the age of the accused, the problem of the age at which a person should be treated as a juvenile delinquent, rather than an adult, is important both because it constitutes a problem within the juvenile court movement and because it extends to, and cuts across, several of the other common problems of juvenile courts. Furthermore, the age standard adopted by the legislature is significant as a statement of policy. It may denote incapacity to commit a crime.[1]

All states have provided some upper age limit, the most common being eighteen years of age.[2] Thirty-two states set their upper age limit at eighteen for both sexes while four states set the limit at eighteen for girls and a lower limit for boys. Of the remaining fourteen states, five have set their upper limit at sixteen, eight have set it at seventeen, and Maryland has an upper limit of eighteen in all parts of the state except Baltimore where the limit is sixteen. These age limits refer for the most part to delinquency jurisdiction as states may provide for different age limits in dependency and neglect cases.

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[1]C. William Reiney, "Problem of Age and Jurisdiction in the Juvenile Court," Vanderbilt Law Review, XIX (June, 1966), 833.

[2]For summaries of jurisdiction of juvenile courts with respect to age limits, see the following: Juvenile Court System Summaries for All States of the United States, the District of Columbia and Puerto Rico (Chicago, Illinois: National Council of Juvenile Court Judges, 1964); Frederick B. Sussmann and Frederick S. Baum, Law of Juvenile Delinquency (3rd ed. rev., Legal Almanac Series No. 22; Dobbs Ferry, New York: Oceana Publications, 1968), pp. 77-86; Juvenile Court Judges Directory and Manual (Chicago, Illinois: National Council of Juvenile Court Judges, 1963), pp. 306-339; and Reiney, "Problem," pp. 838-839.

Although all states place an upper age limit on the jurisdiction of their juvenile courts, the great majority of states have no minimal age limit for the beginning of juvenile court jurisdiction. Because these courts were designed to provide assistance to youths in trouble, legislators apparently have seen little need for excepting even the very youngest children from juvenile court jurisdiction. To exempt the very young from a protective system would, of course, seem irrational.[1]

Specification of a minimum age for the juvenile court has more justification when that minimum precludes delinquency jurisdiction but not dependency or neglect cases, or when the limitation bars placement of any children below a specified age in institutions or environments considered relatively harsh. Arguments for carrying over into the realm of juvenile court jurisdiction the common law rule of incapacity to age seven have not been accepted by state legislatures.[2] California has adopted a lower age limit for purposes of preventing commitment of children under the age of eight years to the California Youth Commission.[3]

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[1]William H. Sheridan, "Gaps in State Programs for Juvenile Offenders," Children, IX (November-December, 1962), 215.

[2]For additional comments on this argument, see Sol Rubin, "The Legal Character of Juvenile Delinquency," The Annals, CCLXI (January, 1949), 6.

[3]Cal. Wel. and Inst. Code, sec. 733 (West 1966).

New York has prohibited children under the age of seven years from being adjudged delinquent.[1] The Illinois statutes contain no such floor relating to either adjudication by the court or commitment to the Department of Correction.[2]

Recognition of the effects of delinquency adjudication would seem sufficient to require some minimum age limit in the statutes governing juvenile court operations. Even apart from possible high court regard for delinquency proceedings as equivalent to criminal prosecutions, there is the plain fact that a child of very tender years cannot appreciate the rightness of his acts whether the legal definition of them be delinquency or crime. Under most of the existing laws the void of a minimum age is filled by the judge and other court personnel, either by the kinds of relaxed treatment allowed for delinquents who are very young or by treating such children as dependent or neglected. Quite possibly there would be an avoidance of future constitutional problems if the statutory base for such relaxed

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[1]N.Y. Family Court Act, sec. 712(a) (McKinney 1963).

[2]The Illinois Youth Commission reported, however, that it had no children from January 1, 1968 to June 30, 1968 on its rosters who were committed before reaching the age of nine years, and less than 2 per cent of the total number of wards were eleven years old or younger when committed. Illinois, Illinois Youth Commission, Youth Commission: Semi-Annual Statistical Summary (Springfield, Illinois: Illinois Youth Commission, 1968), pp. 15-16. There is apparently a disinclination on the part of the courts to commit the very young to the Youth Commission, now the Juvenile Division of the Department of Correction, even though statutory auhority to do so is available.

administration included minimum age limits in the tradition of the criminal law.

One interesting aspect of the problem of age jurisdiction revolves around the issue of the event as of which the child's age is deemed fixed for juvenile court purposes. This issue most frequently arises where the child allegedly commits an offense while within the age jurisdiction set forth by law, but is not proceeded against until he is past the upper age limit. Two reviews of the various statutory requirements on this point concluded that there is sharp conflict of authority.[1] Seven of the jurisdictions examined adhered to the rule that one's age at the time of the institution of proceedings is the determinant, seven use the age at the time of trial, and nine used the age of the child at the time of commission of the offense. The Standard Juvenile Court Act utilizes the interpretation last mentioned,[2] as do the federal statutes.[3] The Illinois law grants jurisdiction to its juvenile courts of:

> . . . [A]ny boy who prior to his 17th birthday or girl who prior to her 18th birthday has violated or attempted to violate, regardless of where the act

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[1]123 A.L.R. 446, and 89 A.L.R.2d 506.

[2]S.J.C.A., p. 24.

[3]D.C. Code (1967), sec. 11-1511, and 18 U.S.C. sec. 5031 (1964), which was interpreted in U.S. v. Fotto, 103 F. Supp. 430 (S.D. N.Y. 1952), and U.S. v. Jones, 141 F. Supp. 641 (E.D. Va. 1956), to require use of the rule accepting age as determined at the time of the offense.

> occurred, any federal or state law or municipal ordinance; and . . . any minor who has violated a lawful court order made under this Act.[1]

It would seem that Illinois has followed the federal procedure in this matter.[2]

Illinois in so fixing its age limit has followed what seems to be the preferred practice, although not one that is free from controversy:

> The principal justifications for requiring the age at the time of trial to be determinative are that one who committed a serious crime as a juvenile but remained un-indicted until after the operation of juvenile jurisdiction had ceased might /otherwise/ be allowed to escape with impunity, and that an adult, guilty of a crime committed as a juvenile, would not be an appropriate subject for an initial application of juvenile protection and reformation. . . . The most penetrating criticism of adopting this standard is that it allows the purposes of juvenile legislation to be frustrated by delays that eventually permit criminal prosecution while eliminating the applicability of the juvenile act.
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> In contrast, the use of a standard based upon the age at the time of the offense has been praised as necessary to implement the purposes of the juvenile law. Such a criterion would avoid most, if not all, of the problems concerning subsequent criminal prosecutions . . .[3]

The problem of possible delaying tactics by prosecution officials planning future criminal prosecutions seems to be the primary objection to utilization of the age-at-time-of-trial determination.

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 702-2.

[2] For a holding interpreting the effect of a continuance at the trial beyond the minimum age for penitentiary sentences, see People v. Carr, 23 Ill.2d 103, 177 N.E.2d 361 (1961).

[3] Reiney, "Problem," pp. 847-848.

The use of some measure of mental age as opposed to chronological age is not the rule under any juvenile court statutes. To date there apparently has been little serious consideration given to expanding juvenile court jurisdiction to include adult mental retards. Perhaps the most convenient aspect of chronological age as a basis of jurisdiction can be found in the fact that it is easily and objectively determinable, at least in most instances. Mental age, on the other hand, is not so objectively measurable, there being controversy as to the validity and reliability of even the available mental tests.[1] Appellate courts have been reluctant to apply the rule of presumption of incapicity, as applicable to children, in adult criminal cases where the accused was mentally defective.[2] In criminal trials adults are presumed to have capacity to commit crimes until otherwise shown by the defense.[3] Because the ability of science to accurately determine mental age remains somewhat inexact, there is little likelihood in the foreseeable future of adoption, either in juvenile or criminal courts, of the mental age standard.

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[1] Ibid., pp. 848-849.

[2] See State v. Schilling, 95 N.J. Law Rep. 145, 112 A. 400 (1920).

[3] See People v. Robinson, 22 Ill.2d 162, 174 N.E.2d 820 (1961), cert. den. 368 U.S. 857 (1961). For additional comment, see Am. Jur.2d, "Criminal Law," sec. 50.

How long the juvenile tribunal may retain jurisdiction is ordinarily prescribed by statute.[1] According to a recent compilation of state laws on this subject, twenty-six of the fifty states permit retention of jurisdiction to age twenty-one of juveniles adjudged delinquent.[2] In some states, such as California,[3] jurisdiction may be maintained past the youth's twenty-first birthday. New York has provided for varying periods of retention of jurisdiction depending upon the status of the juvenile as to the cause of his court appearance.[4] Juveniles in New York who are adjudged delinquent, for instance, may be committed to a suitable institution for a period not to exceed three years, while those found to be "persons in need of supervision" may normally be placed on probation for only one year.

Illinois specifically limits the retention of jurisdiction over delinquents to under twenty-one years of age.[5] At age twenty-one all proceedings under the juvenile court act must terminate. As can be seen, the mere fact that a juvenile court may be deprived of jurisdiction at age

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[1]For a general discussion, see 76 A.L.R. 657.

[2]Juvenile Court Judges Directory and Manual, pp. 306-337.

[3]Cal. Wel. and Inst. Code, sec. 600 (West 1966).

[4]N.Y. Family Court Act, sec. 711 (McKinney 1963).

[5]Ill. Rev. Stat. (1969), c. 37, sec. 705-7(5) and sec. 705-11.

eighteen or thereabouts, in so far as the institution of proceedings is concerned, frequently does not prevent the court from retaining jurisdiction well past the upper age limit for follow-up action. In any event, it should be clear that the upper age limit fixed for initial juvenile court jurisdiction is followed by a time during which the court findings may be implemented or modified

Some states, New York included,[1] further temper their criminal law by creating special handling for some types of young offenders above the juvenile court age but under some advanced age, such as twenty-one or twenty-three. In most states, however, such regard for incomplete maturity seems to be a factor in the way the courts actually function rather than a matter of statutory prescription. The degree to which they temper justice with mercy may simply be higher for young persons, especially first offenders, than it is for more hardened criminals.

Before closing the consideration of age jurisdiction in juvenile courts, it should be noted that there is in Cook County a "Boy's Court" to handle criminal cases where the accused is a boy over seventeen but under twenty-one years of age.[2] This was established in Chicago in 1914 as

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[1]N.Y. Code of Crim. Proc., sec. 913-d and sec. 913-n (McKinney 1963).

[2]See Saul A. Epton, "Boy's Court -- Chicago Style," Juvenile Court Judges Journal, XVIII (Spring, 1967), 23-24.

a branch of the municipal court of Chicago and dealt with misdemeanors and "less serious" criminal action.[1] Unlike the New York youthful offenders act, statutory action was not forthcoming as this was merely a branch of the Chicago municipal court and was not separate from existing court structures. Essentially the Boy's Court was a criminal court which attempted to develop a certain amount of expertise on the part of the presiding judge in dealing with adolescents who would thus be in a better position to judge the case in light of the defendant's age. Following the adoption of the judicial article in 1962, this criminal court for adolescents was presided over by two associate judges.[2] Since it was part of the circuit court no enabling legislation was required. The court has maintained its jurisdiction over various kinds of criminal actions where the accused is a male over seventeen but under twenty-one. There apparently is no similar court for girls over eighteen. It should be stressed that this court is not part of the juvenile court statute, indeed is not even mentioned in the law, but is merely a branch of the circuit court of Cook County which concentrates on those cases described immediately above.

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[1]Negley K. Teeters and John O. Reinemann, The Challenge of Delinquency (New York, New York: Prentice-Hall, 1950), pp. 350-352.

[2]Epton, "Boy's Court," pp. 23-24.

The options that police and prosecutors may have between delinquency and criminal actions for persons within the juvenile court age, and whether the juvenile court judge has any authority to decide between the two forms of action, constitute an especially complex aspect of juvenile court law and deserve detailed examination below.[1]

Classes of Cases Involving Children

Delinquency cases, as distinguished from proceedings involving the care of dependent and neglected children, appear to account for the bulk of the workloads of the tribunals administering juvenile justice. In 1967 the juvenile courts providing information to the Children's Bureau of the U.S. Department of Health, Education, and Welfare reported their dependency and neglect jurisdiction, as opposed to delinquency jurisdiction, constituted only 15.9 per cent of the case load.[2] These figures may be subject to misleading interpretations and possibly are not based on comparable data from state to state, but even so it is obvious that considerable variation exists among the states as to the percentage of juvenile court cases labeled "delinquent" and "dependent and neglected." In Illinois 37 per cent of the cases heard under the juvenile court statute were neglect

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[1]See page 173.

[2]Juvenile Court Statistics 1967, p. 9 and p. 14. This figure was computed from totals not including traffic cases.

or dependency proceedings. The corresponding figure for California was 22 per cent, and for New York 17 per cent. Possibly these variations may be explained by more highly developed welfare agencies in New York and California that take part of the burden from their juvenile courts in such matters.

An overload of neglect-dependency cases may well have the undesirable result of straining a court's resources in dealing with delinquency cases.[1] The trend, accordingly, seems to be one of charging public and private welfare agencies with more of the work of caring for dependent and neglected children so that the juvenile courts may concentrate more fully on the troublesome tasks for which they are presumably more fitted. This explains the Illinois action in 1965 which excluded those cases from juvenile courts arising because of the parent's adverse financial circumstances,[2] an effort that has, however, been only of limited success in reducing miscellaneous juvenile court workloads.[3]

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[1]See the Report of the Citizens Committee on the Family Court, p. 39. For a similar view, see The Challenge of Crime in a Free Society, p. 85, and The Cook County Family (Juvenile) Court, p. 31.

[2]Ill. Rev. Stat. (1969), c. 37, sec. 705-7.

[3]Indeed, figures provided by the Children's Bureau for 1964 show that the proportion of dependency-neglect cases was then 32.8 per cent, which is over four per cent lower than in 1967. Juvenile Court Statistics 1964, p. 16.

A recent elaboration of categories of children subject to juvenile court adjudication has been achieved through the adoption of the term "person in need of supervision," or PINS as they are sometimes referred to, and "minor in need of supervision," or MINS.[1] These categories of cases are not so much additions to the courts' jurisdiction as groupings of borderline delinquents for whom it is desirable to assure juvenile court supervision without the stigmatization of delinquency, and without the relatively high degree of confinement that a delinquency adjudication may involve. This category has been included in New York[2] and Illinois[3] laws. Some of the actions described are, in effect, made illegal for children only. In Illinois MINS refers to any minor under eighteen years of age who is "beyond the control of his parents, guardian or other custodian . . . /or/ habitually truant," or is a drug addict.[4] Persons so adjudged may not initially be committed to an institution operated by the Department of Corrections although he may be placed on probation and later committed thereto for probation violation.[5]

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[1]For a discussion, see Task Force Report, pp. 25-27.

[2]N.Y. Family Court Act, sec. 712(b) (McKinney 1963).

[3]Ill. Rev. Stat. (1969), c. 37, sec. 702-3.

[4]Ibid.

[5]Ibid., sec. 705-7.

Hopes that this PINS or MINS category would avoid stigmatizing the youth so adjudged have apparently not been borne out.[1] Any juvenile court action likely involves an inevitable negative impression that is well beyond the effectual range of label changes. However, even more troublesome than the new terminology's apparent inability to eliminate stigmitization of persons formally dealt with by the court, is its creation of an ill-defined area of judicial discretion. The President's Commission on Law Enforcement has observed:

> The provisions on which intervention in this category of cases is based are typically vague and all-encompassing. . . . Especially when administered with the informality characteristic of the court's procedures, they establish the judge as arbiter not only of the behavior but also of the morals of every child . . . appearing before him. . . . One frequent consequence has been the use of general protective statutes about leading an immoral life and engaging in endangering conduct as a means of enforcing conformity -- eliminating long hair, levis, and other transitory adolescent foibles so unsettling to adults.[2]

To remedy this situation the commission recommended that the PINS and MINS classifications be substantially reduced if not eliminated.

Most of the other classes of cases over which juvenile courts in one or more states are given jurisdiction are more akin to the dependency and neglect category than to the

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[1] Task Force Report, p. 26.

[2] Ibid., p. 25.

delinquency classification.[1] A notable exception, however, relates to traffic violations. In Illinois, such cases are specifically exempted from the jurisdiction of the juvenile courts,[2] and this seems increasingly to be true elsewhere as well. New York, however, does not so separate traffic violations and California has instituted a system of traffic referees attached to the juvenile courts to handle traffic cases involving juveniles.[3] It would appear that most traffic violations are not serious enough breaches of normal conduct to constitute evidence of delinquency, or involve heavy enough penalties to call for special treatment of the young. This, however, is not invariably so and the main justification for excluding traffic cases from the juvenile courts may be that the workloads involved would be too burdensome.

Classes of Cases Involving Adults

Some jurisdictions have included within their juvenile justice system authorization for handling such matters as child support, paternity suits, and even certain criminal offenses against family members. In these instances the

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[1]For example, see Cal. Wel. and Inst. Code, sec. 600 (West 1966), and N.Y. Family Court Act, sec. 234 (McKinney 1963).

[2]Ill. Rev. Stat. (1969), c. 37, sec. 702-7(2). Excluded also were offenses relating to boating, fishing, and game laws punishable by fine only.

[3]Cal. Wel. and Inst. Code, sec. 561 (West 1966).

court's authority is broadened to include various categories of adults who have been guilty of some prohibited action, or who have been negligent in performing some required duty, affecting children. The rationale behind this expansion of juvenile court authority has been admirably summarized by a former juvenile court judge:

> The problem of the parents and children are inseparable. No problem of a neglected or delinquent child can be treated successfully without also considering the attitudes and actions of the parents.[1]

This view finds additional support from the Children's Bureau, which has urged the inclusion within juvenile or family court jurisdiction of the authority to handle cases against adults who have failed as parents to provide for their children or who have violated a law with respect to their relationship with their children.[2] The agency does not recommend that the court have jurisdiction over adults who do not have a "continuing relationship" with the child in question.

A somewhat similar approach is taken by the Standard Juvenile Court Act.[3] There are, however, also studies which do not look with favor on such a movement toward a true

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[1]George W. Smyth, "The Juvenile Court and Delinquent Parents," Federal Probation, XIII (March, 1949), 12.

[2]Standards, p. 43.

[3]S.J.C.A., p. 28.

"family court."[1] This negative view may be traced not so much to theoretical objections against the concept of a unified court apparatus to handle various family legal problems, as to the paucity of data available concerning the court's required resources and expectant demands. The fear is that the added jurisdiction will be at the expense of quality performance of the more basic tasks.

The New York experience with a family court having considerable adult jurisdiction may ultimately provide information filling many of the gaps in the available data. The New York law provides, among other things, that the family court have exclusive jurisdiction in proceedings involving support, paternity disputes, child custody, adoption, and family offenses.[2] This system is in close accord with the Standard Juvenile Court Act recommendations,[3] but is something short of the Children's Bureau suggestions.[4]

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[1]The Illinois study, while agreeing that a family court was desirable as a future goal, declined to make such recommendation because of the need for a "major study" of the whole matter. The Cook County Family (Juvenile) Court, p. 32. In California, the Governor's Commission made no recommendations for inclusion of adult jurisdiction, indeed they suggested the removal from the Welfare and Institutions Code of Section 702 dealing with the offense of contributing to delinquency, and placing it in the Penal Code, completely separate from the juvenile court law. Cal. Gov. Comm. Report Pt. I, p. 23.

[2]N.Y. Family Court Act, sec. 115 (McKinney 1963).

[3]S.J.C.A., p. 28.

[4]Standards, p. 45.

The latter has proposed that divorce matters also be adjudicated within the family court. New York's family court jurisdiction does not extend to such matters. To this writing no comprehensive analysis of the New York court's performance has appeared, although various aspects of its functioning have been cited with approval.[1]

Such criminal jurisdiction as is vested in juvenile and family courts has traditionally been associated with alleged contribution to the delinquency, dependency, or neglect of a minor.[2] In 1963 it was reported that just under half of the jurisdictions in the United States made provision for handling this class of cases in their juvenile courts.[3] Just over half of the states having such courts were reported to have had such an authorization in 1927.[4] Thus, apparently the proportion has remained somewhat static since that year.

On the issue of the desirability of such criminal jurisdiction, the Standard Juvenile Court Act has noted:

> . . . [T]he efficacy of the "contributing" laws, which are frequently directed against parents, has been doubted in many quarters. It seems more desirable, from both a legal and social point of view, to prosecute in such cases under a definite criminal

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[1] Task Force Report, p. 34.

[2] Am. Jur., "Juvenile Courts," sec. 94.

[3] Juvenile Court Judges Directory and Manual, pp. 306-337.

[4] Herbert H. Lou, Juvenile Courts in the United States (Chapel Hill, North Carolina: University of North Carolina Press, 1927), p. 56.

> code provision, such as assault, impairing the morals of a minor, or any of the varied statutes in existence.[1]

The Children's Bureau has echoed this sentiment.[2]

New York has followed these lines quite closely. There is in the New York legal codes no specific offense classified as a "contributing" action although the family court is given jurisdiction over any proceeding concerning acts which would constitute disorderly conduct or assault between family members.[3] Both Illinois[4] and California,[5] contrarywise, have such laws and have placed them outside the juvenile court jurisdiction. When hearing these cases, which may be classified as "criminal," the courts, whatever their label, must apply rules of criminal procedure.[6]

Illinois' experience with adult jurisdiction in its juvenile and family courts has been somewhat limited. Under the present law, the juvenile court may order parents

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[1]S.J.C.A., pp. 28-29.

[2]Standards, p. 43.

[3]It has been held, however, that this statute does not apply to felony complaints. People v. Klaff, 35 N.Y. Misc. 2d 859, 231 N.Y.S.2d 875 (1962).

[4]Ill. Rev. Stat. (1969), c. 23, sec. 2361(a).

[5]An earlier California "contributing" statute was repealed in 1961, but under present California law provision is made for the punishment of persons engaging in actions that, in effect, contribute to the delinquency, neglect, or dependency of minors. Cal. Penal Code, sec. 270 (West 1969 Supp.)

[6]Am. Jur., "Juvenile Courts," sec. 93.

or guardians to pay support for their children under penalty of contempt for refusal to obey.[1] It may also require the legal custodian of the child to make periodic reports to the court.[2] Even the statute enacted in 1949 which affixed the name "Family Court" included but one major subject area of adult jurisdiction.[3] The relevant sections provided dispositional alternatives to the family court in hearing "contributing" cases. Not only could parents be proceeded against but so too could non-family members. Penalties ranged upon conviction from probation to one year imprisonment and/or a $1,000 fine. This criminal jurisdiction was eliminated under the 1965 revision and placed in a separate chapter of the legal code.[4]

The Citizen's Committee on the Family Court of Cook County, while in theory favoring the family court idea, has not urged legislative action to this end:

> Legislation conferring adult jurisdiction does not seem necessary in light of the possibility of Circuit Court ability to determine this by rule of the court. Conferring domestic relations jurisdiction on the Family Court is not recommended at this time . . . although part of any long range plan for the creation of the true "family court" would undoubtedly require changes in substantive legislation,

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 707-4(1).

[2] Ibid., sec. 705-8.

[3] Laws of Illinois (1949), p. 395. For a general discussion of adult jurisdiction in Illinois family courts, see Weiss, "The Illinois Family Court Act," p. 538.

[4] Ill. Rev. Stat. (1969), c. 23, sec. 2361.

> particularly with respect to the use of specialized staff in domestic relations cases.[1]

The extent to which Illinois circuit courts have implemented the implied suggestion of the Citizen's Committee and have integrated juvenile and adult "contributing" cases into a unified division is not readily discernable from available data. As all trial courts in Illinois are unified into the circuit court, there is no constitutional or statutory reason why a single division could not handle childrens' matters and adult cases involving offenses against children.

Limits on Jurisdiction

There remains to be discussed the elements in juvenile court jurisdiction which permit various categories of youths who would normally be handled as delinquents to be proceeded against, instead, as adults. The procedure involved is variously referred to as a waiver of jurisdiction or transfer proceedings.[2]

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[1] The Cook County Family (Juvenile) Court, p. 32.

[2] For a useful introduction to transfer proceedings, see the following: Jurisdiction over Juvenile Offenders, pp. 23-26; David R. Barrett, William J. T. Brown, and John M. Cramer, "Notes - Juvenile Delinquents: The Police, State Courts, and Individualized Justice," Harvard Law Review, LXXIX (February, 1966), 793; and Fred G. Suria, Jr. and M. Cherif Bassiouni, "The Illinois Juvenile Court Act -- A Current Perspective," Illinois Continuing Legal Education, V (April, 1967), 113-116.

An advisory council of judges to the National Council on Crime and Delinquency has indicated its approval of the latter terminology:

> The court is not "waiving" some right or power; rather it is considering retention of jurisdiction. Only on the findings of a hearing does it transfer the case, which it does by certifying that certain criteria have been met and that consequently the criminal court is empowered to take jurisdiction.[1]

Nevertheless it is a fact that both jurisdictional waiver and transfer are terms that continue in wide use.

Endowment of jurisdiction over juveniles in the criminal courts may, indeed, be established without any step identifiable as a positive yielding of jurisdiction by the juvenile court. Criminal courts may be given concurrent jurisdiction over certain categories of cases and/or where the offender is above a specified age. There are even instances where criminal courts have exclusive jurisdiction because of an exceptional provision relating to certain crimes of violence.[2]

Where there is concurrent jurisdiction, the decision as to which structure is to be used in proceeding against the juvenile most commonly lies in the discretion of the

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[1] "Transfer of Cases Between Juvenile and Criminal Courts," Crime and Delinquency, VIII (October, 1962), 4.

[2] For a penetrating analysis of the approaches used in allocating the jurisdiction between juvenile and criminal courts, see Reiney, "Problem," pp. 841-842, and for a summary of the statutory provisions throughout the United States on transfer to criminal court, see Juvenile Court Judges Directory and Manual, pp. 306-337.

juvenile court judge but in some states it is vested in the local prosecutor.[1] One example of concurrent jurisdiction is in California where jurisdiction is basically exclusive for the juvenile court for persons under eighteen and concurrent for those aged eighteen through twenty.[2] As might be expected, however, few persons eighteen years old, and even fewer nineteen and twenty years old are proceeded against in the juvenile court.[3]

Procedures under which the criminal courts obtain jurisdiction over juveniles without intervening clearance by the juvenile court have been the subject of critical comment, as follows, by the President's Commission on Law Enforcement:

> If the juvenile court has the choice whether to transfer, it can be expected that at least minimally informed consideration will have been given such matters as the alleged offender's performance as a juvenile and the disposition alternatives available. It is undesirable for the decision to be made by the prosecutor or adult court judge, who is less likely to be familiar with institutions and other treatment resources and less accustomed to concentrating on the individual aspects of a given case.[4]

The juvenile court judge is thus thought of as being the most suitable authority for a decision on whether, in a

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[1]Monrad G. Paulsen, "The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court," in Justice for the Child, ed by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), p. 61.

[2]Cal. Wel. and Inst. Code, sec. 600 (West 1966).

[3]Edwin M. Lemert, "The Juvenile Court -- Quest and Realities," in Task Force Report, p. 100.

[4]Task Force Report, p. 24.

particular instance, criminal proceedings are more appropriate than delinquency charges.

For very young persons who are first offenders or whose delinquent acts are not indicative of hardened criminality, most writers would urge exclusive jurisdiction in the juvenile court.[1] Waiver of jurisdiction, or independent concurrent jurisdiction in the criminal courts, finds more support for older adolescents and for those committing more heinous acts. In the latter circumstances there is both more doubt as to the suitability of juvenile court techniques and placement facilities and more feeling that the supposedly sterner sanctions of the criminal law should be invoked.

In any event, some procedure to establish criminal court jurisdiction over juveniles is common. One authoritative source reported in 1967 that all but three states had some provision by which certain charges against juveniles could be handled in an appropriate adult criminal court.[2] The President's Commission on Law Enforcement has indicated that the most frequently considered factors for such handling are the record and history of the juvenile, the seriousness of the alleged offense, and the violence

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[1]For example, see Paulsen, "The Delinquency," pp. 62-63.

[2]Orman W. Ketcham and Monrad G. Paulsen, Cases and Materials Relating to Juvenile Courts (Brooklyn, New York: The Foundation Press, 1967), pp. 126-127.

or aggressiveness by which the offense was committed.[1] A lack of standards guiding waiver decisions is apparently common throughout the United States.[2]

Concern for the public's attitude to the juvenile court and law enforcement in general has been cited as the major explanation for these relaxations of juvenile court jurisdiction.[3] The political issue is that for delinquency jurisdiction to be sold to legislators who view it as a softening of criminal law, some concessions may need to be made so that a heinous and/or hardened offender does not escape without punishment merely because of his age. Although some commentators have called for the elimination of these exceptions to complete juvenile court jurisdiction, there is presently little likelihood of that coming to pass.[4]

Prior to the 1960's, the sound discretion of the juvenile court judge or other designated official in deciding transfer and waiver matters was though to be absolute, assuming that he conformed with the law.[5] A 1929 decision

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[1] Task Force Report, p. 78, Appendix B, Table 5.

[2] "Rights and Rehabilitation in the Juvenile Courts," Columbia Law Review, LXVII (February, 1967), 315-316.

[3] Task Force Report, p. 78, Appendix B, Table 5.

[4] See Douglas A. Sargent and Donald H. Gordan, "Waiver of Jurisdiction," Crime and Delinquency, IX (April, 1963), 121-128.

[5] Sol Rubin, "Legal Definition of Offenses by Children and Youths," Law Forum, 1960 (Winter, 1960), 518, and Sol Rubin, "Trends in Juvenile Court Philosophy," Social Work VII (April, 1962), 50.

of the Missouri Supreme Court is representative of what many appellate courts thought to be the rule.[1] The Missouri high court upheld the state's juvenile court statute and rejected claims of the appellant that its waiver provisions denied him equal protection of the laws under the Fourteenth Amendment to the federal Constitution. Empowering the juvenile courts with authority to effectuate waiver of jurisdiction of specified classes of cases was held to constitute needed judicial discretion to handle juvenile offenders. Such discretion was to be "exercised soundly." The court did not elaborate as to what standards exist in the sound exercise of the power to waive jurisdiction, nor did it indicate whether such power in the hands of the prosecuting attorney would be permissible.

Illinois appellate courts in review of the type of exceptions to juvenile court jurisdiction under discussion, have accepted the view that the criminal courts here have inherent jurisdiction which the legislature could not and had not limited by creating the alternative of a delinquency proceeding.[2]

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[1] State ex. rel. Boyd v. Rutledge, 321 Mo. 1090, 13 S.W.2d 1061 (1929).

[2] People v. Lattimore, 362 Ill. 206, 199 N.E. 275 (1935). See also State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954). For further discussion of Illinois transfer proceedings, see below at page 182.

The first consideration by the United States Supreme Court of transfer or waiver matters came in Kent v. United States.[1] It will be recalled that in a decision limited to statutory procedures in Washington, D.C., the court held that due process in transfer proceedings forbade denial of access to social records by a youth's counsel, whose presence is a guaranteed right. New guidelines were thus given to the mode in which court discretion was to be exercised.

Of the remaining cases heard by the Supreme Court concerning juvenile delinquency, only in In re Whittington[2] was the issue of waiver of jurisdiction touched upon. On the issue of his transfer to criminal court in the interval between the juvenile court's adjudicatory and dispositional actions, the Supreme Court said:

> Upon such remand, the Ohio court may, of course, also consider the impact, if any, on the questions raised by petitioner of the intervening order of the Juvenile Court requiring him to face trial in the adult courts.[3]

Judge Orman Ketcham has written of this case:

> This action adds new significance and dimension to the pre-transfer procedural requirements detailed

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[1] 383 U.S. 541 (1966). For a more general discussion of the Kent case, see above at page 102.

[2] 391 U.S. 341 (1968). For a more general discussion of the Whittington case, see above at page 137.

[3] Ibid., p. 344.

> in Kent. In Whittington and future felony cases in which transfer is a possibility, due process will require counsel, notice of the nature of the hearing, disclosure of social and legal files, a transcript of the hearing, and a written order explaining the findings and grounds for waiver.[1]

The judge is apparently convinced that the Whittington case has the effect of making Kent applicable to state transfer proceedings, and this may very well prove true.

Basically this view is founded upon Kent's affirmation that waiver of jurisdiction is a "critically important" action determining vitally important rights of the juvenile, and Gault's requirement that juveniles be given due process and fair treatment. F. Thomas Schornhorst of the University of Indiana Law School, has written:

> To now discount Kent because it dealt with only a narrow issue of statutory interpretation, and then to distinguish Gault on the right to counsel issue because waiver of juvenile court jurisdiction does not result in "confinement" but in transfer to another court, reaches a new apogee of judicial sophistry.[2]

While this is not quite the same thing as asserting that the court has already declared Kent to be fully applicable on state transfer proceedings, anything other than such a holding in the future is difficult to anticipate.

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[1]Orman W. Ketcham, "Commentary: What Happened to Whittington?" George Washington Law Review, XXXVII (December, 1968), 331.

[2]F. Thomas Schornhorst, "The Waiver of Juvenile Court Jurisdiction: Kent Revisited," Indiana Law Journal, XLIII (Spring, 1968), 588.

Policy considerations which are distinguishable from due process also have a role in this matter of transfers, waivers, and the like. Recommendations by the National Council on Crime and Delinquency in its Standard Juvenile Court Act[1] and the Children's Bureau in its Standards for Juvenile and Family Courts[2] do not include specific reference to procedural guarantees as outlined in Kent, but do suggest a minimum age of sixteen, a felonious action, and "full investigation" by the juvenile court. Transfer should be allowed, according to the Children's Bureau, only when these conditions are met, and:

> . . . only after a social study of the child is made, a hearing held, and the court finds that the child is not committable to an institution for the mentally deficient or the mentally ill and is not treatable in any institution or facility of the State designed for the care and treatment of children, or where the court finds that the safety of the community clearly requires that the child continue under restraint for a period extending beyond his minority or the facilities of the criminal court provide a more effective setting for disposition.[3]

Whether such a careful inquiry, to conform with sound policy and due process considerations, can be conducted without raising the ogre of double jeopardy is a potentially troublesome matter. As will be seen below, however, this problem has not thus far significantly hampered transfer

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[1]S.J.C.A., p. 33.

[2]Standards, pp. 34-35.

[3]Ibid., p. 35.

proceedings.[1] Aside from the issue of former jeopardy, transfer from juvenile to criminal courts poses somewhat unique difficulties if due process is to be achieved.

Illinois is one state that has had considerable trouble in achieving a workable method for limiting juvenile court jurisdiction through transfers to criminal courts. The first test of Illinois' transfer proceedings came in 1926 when the Illinois Supreme Court held that a statutory provision giving juvenile courts authority to "permit" transfers to criminal courts,[2] meant that juvenile and criminal courts had concurrent jurisdiction over juveniles charged with crimes and falling within the jurisdictional boundaries of the juvenile court statute.[3] As to whether the permission of juvenile courts was required before criminal proceedings could be instituted against juveniles subject to its jurisdiction, the same court decided negatively in People v. Lattimore.[4] The court reasoned:

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[1]For further comment on former jeopardy, see below at page 286.

[2]Ill. Rev. Stat. (1925), c. 23, sec. 199.

[3]People v. Fitzgerald, 322 Ill. 54, 152 N.E. 542 (1926).

[4]People v. Lattimore, 362 Ill. 206, 199 N.E. 275 (1935). Also see the case of People ex. rel. Malec v. Lewis, 362 Ill. 229, 199 N.E. 276 (1935), for further Illinois Supreme Court comment on this issue. The Lattimore case is of particular interest in that the juvenile had already been adjudged delinquent when the criminal prosecution took place. The court did not discuss the issue of former jeopardy. The likelihood of avoiding this issue in a similar case at the present time would seem small indeed.

> The juvenile court is a court of limited jurisdiction. The legislature is without authority to confer upon an inferior court the power to stay a court created by the Constitution from proceeding with the trial of a cause jurisdiction of which is expressly granted to it by the Constitution. Nor, in our opinion, was it the legislative intent to attempt to confer such power upon the juvenile court.[1]

This decision had the effect of giving the power of waiver of juvenile court jurisdiction to prosecuting attorneys who were not obliged to seek permission of the juvenile court to proceed criminally against a child who might also be handled as a delinquent.[2] Clearly if the choice for transfer lay in the prosecutor's hands, meeting any "full investigation" standard would be most difficult to achieve. This method has been criticized as violative of juvenile court principles[3] and as confusing in the lack of standards used in transfers.[4]

One of the anticipated results from the 1962 amendment to the Illinois Constitution[5] was its elimination of

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[1] People v. Lattimore, 362 Ill. 206, 208, 199 N.E. 275 (1935).

[2] Juvenile Court Proceedings in Delinquency Cases (Illinois Legislative Council, Bulletin 3-122; Springfield, Illinois: Illinois Legislative Council, 1958), p. 4.

[3] Charles L. Chute, "The Juvenile Court in Retrospect," Federal Probation, XIII (September, 1949), 5.

[4] Jerome S. Weiss, "Criminals or Delinquents -- Another Illinois Merry-Go-Round," Chicago Bar Record, XXXIV (January, 1953), 153.

[5] Illinois, Constitution (1962 Amend.), art. VI.

the status of an "inferior" court for juvenile courts.[1] Subsequent developments have not supported this view. In 1968 the Illinois Supreme Court, interpreting the transfer provisions of the now repealed family court statute, continued the Lattimore interpretation and ruled that juvenile courts could not prevent a criminal action against a minor defendant.[2] Present statutes say that the state's attorney "shall" determine, after a delinquency petition has been filed in juvenile court, in which court the juvenile shall ultimately be proceeded against, except that if the juvenile court judge objects to a proposed trial in criminal court, the matter "shall" be referred to the chief judge of the circuit for decision.[3] This complex procedure was accepted after organized opposition from state's attorneys arose over a proposed scheme whereby discretion for transfer would have been given solely to the juvenile court judge.[4] According to the Illinois Commission on Children, some state's attorneys are ignoring statutory specifications and proceed against juveniles in the criminal courts without any

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[1]Eisendrath, "The Judicial Article," p. 444.

[2]People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968). After oral arguments had been heard, the Supreme Court dismissed its earlier writ of certiorari as improvidentially granted. 397 U.S. 660 (1970).

[3]Ill. Rev. Stat. (1969), c. 37, sec. 702-7(3).

[4]Pate, "The State Council," p. 20.

preliminary action in the juvenile court.[1] Indeed, between January 1, 1966 and September 1, 1968 the total number of juveniles tried in all Illinois criminal courts is reported to have exceeded the number transferred there from the juvenile court. At the December 13, 1968 meeting of the chief judges in Illinois, there is reported to have been unanimous agreement that no authority exists for state's attorneys to proceed criminally against juveniles without first bringing the youth before the juvenile court.[2] However, an Illinois appellate court held in May, 1969, that the lack of objection by the juvenile court judge to criminal prosecution of a juvenile after the filing of a delinquency petition was sufficient in itself to indicate dismissal of the petition and the juvenile court's acquiescance to criminal prosecution.[3] There is thus some implied sanction for state's attorneys to continue criminal court action not protested against by the appropriate juvenile court judge, even though the decision went on to uphold the statutory provisions making the chief judge the arbiter of juvenile court-state's attorney conflicts on transfer.

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[1]Illinois, Commission on Children, Biennial Report 1969 (Springfield, Illinois: Commission on Children, 1969), p. 17. The Illinois statute requires the filing of a delinquency petition in juvenile court before criminal proceedings are instituted. Ill. Rev. Stat. (1969), c. 37, sec. 702-7(3)

[2]Biennial Report 1969, p. 17.

[3]People v. Carlson, 108 Ill. App.2d 463, 247 N.E.2d 919 (1969)

On its face the Illinois statute does not meet the requirements of Kent in transfer proceedings.[1] No standards are specified for the state's attorney, and no guidelines are provided for the juvenile court in deciding whether to object to such action.[2] There is a similar lack of standards so far as the circuit judge is concerned. However, there may be the saving feature of compliance with appropriate due process requirements by those who act under the statute. The combination of the Kent-Gault doctrines controls as a mandated standard of conduct.

Only brief attention is required for instances in which criminal court jurisdiction is the choice of the juvenile and his counsel. The Illinois statute provides for the granting of this request by the juvenile court judge.[3] This option would presumably be used either where the act alleged is serious but the legal defense would be more effective in criminal court or when the offense is not grave and the criminal penalty would be preferable to the disposition of the juvenile court.

Neither in California nor New York is there a comparable option for the juvenile. There is, however, no evidence to indicate that, even where the right is made

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[1]For a critical commentary of Illinois procedure, see "Rights and Rehabilitation," p. 313.

[2]Ill. Rev. Stat. (1969), c. 37, sec. 702-7(3).

[3]Ibid., sec. 702-7(5).

available to accused delinquents, it is frequently used. Thus, the practical consequences of including such provision in juvenile court statutes may be slight.

One final observation about the jurisdiction of juvenile courts relates to the Interstate Compact on Juveniles, to which all but three states are now signatories.[1] Juveniles charged with delinquency in one state and who are apprehended by the authorities of another state may, under the provisions of the compact, be returned though they be subject to the juvenile court jurisdiction of the second state.[2] Written in 1955 at an interstate conference held in New York City, the compact was designed to do for delinquency cases what the interstate rendition clause of the U.S. Constitution does for criminal prosecutions in specifying interstate rendition for fugitives from justice.[3] Under the Illinois statute the governor appoints a compact administrator to facilitate its administration.[4]

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[1] Standards, p. 41, and U.S., Congress, House of Representatives, Committee for the District of Columbia, Adoption of the Interstate Compact on Juveniles by the District of Columbia, H.R. Report No. 91-373, 91st Cong., 1st sess., 1969, p. 2.

[2] For complete text of compact, see Ill. Rev. Stat. (1969), c. 23, sec. 2591.

[3] Book of the States 1956-57 XI (Chicago, Illinois: Council of State Governments, 1956), pp. 15-16. For a summary and discussion of the major provisions of the compact, see Mitchell Wendell, "The Interstate Compact on Juveniles: Development and Operation," Journal of Public Law, VIII (Fall, 1959), 524-536.

[4] Ill. Rev. Stat. (1969), c. 23, sec. 2591.

CHAPTER V

PRE-TRIAL PROCEDURES

During a speech given to a meeting of juvenile court judges, Earl Warren, then Chief Justice of the United States, commented briefly upon the subject of "Equal Justice for Juveniles." Directing his remarks toward procedures utilized in the administration of juvenile justice, the Chief Justice touched on several issues to be considered here in due course:

> Where the adult is concerned, the concept [of equal justice] conjurs up the image of an objective evenhanded administration of the law, in which the basic rights of each individual are zealously and jealously safeguarded, with no regard to the rank or status of the defendant before the bar.
>
> Surely, the child who is the subject of a delinquency complaint is entitled to comparable, if not greater, safeguards. . . .
>
> It would not be proper and I know you would not wish me to say here whether I think . . . that every child brought before the court must be represented by counsel. That will have to wait until proper cases come before the court. I can say, however, that I think lawyers can be most useful and helpful to the court. Nor can I say here whether strict rules of evidence must be followed but I can suggest that a reasonable adherence to orderly presentation of the facts in a particular case will prevent miscalculations and minimize the possibilities of miscarriages of justice. . . . As time goes on, we will come to grips and resolve finally such questions as to whether, as a matter of right a juvenile delinquent is entitled to trial by jury, whether the privilege of confrontation, self-incrimination, proof beyond a reasonable doubt, admission to bail, and so on applies.[1]

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[1]Earl Warren, "Equal Justice for Juveniles," Juvenile Court Judges Journal, XV (Fall, 1964), 15-16.

Some of the problem areas mentioned by the Chief Justice have already been touched upon in Supreme Court decisions while others remain open for future consideration. It is appropriate to first consider the pre-trial procedures or intake mechanisms used by juvenile courts.

Apprehension and Detention

As has previously been noted, the overwhelming majority of juvenile court referrals takes place with the detention of a juvenile by the police for some behavior that the arresting officer deems sufficient to warrant apprehension. If the officer does not release the juvenile, with or without a warning, the next step involves taking him to some headquarters for interrogation and further disposition. In Illinois the initial detention may be effected without an arrest warrant if the officer has "reasonable cause" to believe that the youth has violated a law and/or falls into the categories of delinquent, dependent, neglected, or is otherwise in need of supervision.[1] This is comparable to the rules for criminal arrests without a warrant.

The youth may then receive what has been called "station adjustment" and be released with or without an

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 703-1(1). For a general discussion of the Illinois requirements in the arrest procedures of juveniles, see Arthur L. Dunne, "14th Amendment, the Bill of Rights and the Juvenile Delinquent," Chicago Bar Record, XLI X (November, 1967), 62-73.

admonition. One report indicates that 28,634 of the 44,485 juvenile offenders arrested in Cook County in 1966 received such station adjustment, with no resulting delinquency petition.[1] This figure does not include what may be an even larger number of juveniles picked up and released immediately by arresting officers or their superiors with no report being filed.

Station adjustment would ordinarily appear to be rather authoritarian and quite informal, but it may involve contacts with all parties affected and in reality constitute a pre-hearing adjudication of the charges and even some informal disposition.[2] There is no specific Illinois statutory authority for the police to conduct such proceedings, but they do fall within what may be considered the normal range of police activity. Moreover, there is the obvious

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[1]Anton R. Valukas, "The Juvenile Court in Operation -- Substantial Improvements Needed," Chicago Bar Record, L (April, 1969), 364, note #18. That station adjustment is an ingrained process in the administration of juvenile justice in Illinois may be seen from the fact that it was reported in a Children's Bureau publication that in 1919 14,500 of 16,995 complaints in Cook County were adjusted without court action. U.S., Department of Labor, Children's Bureau, The Chicago Juvenile Court by Helen R. Jeter, Pubn. No. 104 (Washington, D.C.: Government Printing Office, 1922), p. 43. No figures were given for the remainder of the state. For comment on this practice in New York, see Justine W. Polier, A View From the Bench: The Juvenile Court (New York, New York: National Council on Crime and Delinquency, 1964), pp. 7-9.

[2]Fred G. Suria, Jr. and M. Cherif Bassiouni, "The Illinois Juvenile Court Act -- A Current Perspective," Illinois Continuing Legal Education, V (April, 1967), 110.

advantage, in so far as juvenile courts are concerned, of the elimination of many potential delinquency petitions involving relatively minor breaches of conduct. Recognizing this fact, the Citizen's Committee on the Illinois Family Court has recommended closer cooperation between juvenile court judges and police officials in an effort to accomplish more station adjustments.[1]

If the police in Illinois do not make a station adjustment and release the juvenile he must be taken without unnecessary delay to the juvenile court or other place determined by rule of the court for the reception of juveniles.[2] The officer in charge there has the authority to hold the juvenile pending further proceedings or to release him and set a time for a full hearing on some later date.[3] Detention may be ordered only in the following circumstances

> /If/ . . . the probation officer or such other public officer designated by the court finds that further detention is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another, that he is likely to flee the jurisdiction of the court or that the minor was taken into custody under a warrant.[4]

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[1] Report of the Citizen's Committee on the Family Court (Chicago, Illinois: The Citizen's Committee on the Family Court, 1963), pp. 31-32.

[2] Ill. Rev. Stat. (1969), c. 37, sec. 703-2(1).

[3] Ibid., sec. 703-5.

[4] Ibid., sec. 703-4.

Any such confinement must avoid placement with adults accused of a crime. No minor in Illinois under fourteen years of age may legally be confined in a jail or place ordinarily used to confine adult prisoners, and boys under seventeen or girls under eighteen years of age may legally be kept in such institutions only if they are separated from the confined adults.[1] Moreover, such detention may be continued only for thirty-six hours without an appearance before a judicial officer for a full hearing. The detention hearing, paralleling the "probable cause" hearing in criminal procedure, determines if there is probable cause to believe that the juvenile is a person described in the juvenile court statute as coming within its jurisdiction, and if it is necessary to order continued detention of the juvenile. If probable cause is found, a petition is then filed with the court based on information and belief.

Where further detention is ordered pending a hearing on the petition itself, that hearing must be held within ten days from the date of the detention order, as against thirty days if the juvenile is released to the custody of his parents or other responsible adults.[2] The Illinois law does make provision for informal probation for a period not to exceed three months pending the official adjudication

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[1] Ibid., sec. 702-8(1).

[2] Ibid., sec. 704-2.

proceeding if there is no objection from any of the parties involved.[1] By utilizing this approach, an official adjudication of delinquency may be avoided but at the same time permitting application of the probation department's rehabilitation program.[2]

Unreasonable Searches and Seizures

Limiting and shaping the pre-trial procedures broadly described in the paragraphs immediately above are several issues of constitutional import. Indeed, much of the past decade's re-evaluation of juvenile court procedures has been directly concerned with events taking place outside the courtroom in the period between police apprehension and commencement of formal legal proceedings.

One of the constitutional issues challenging police procedures in dealing with juveniles is the protection against unreasonable searches and seizures. As with other constitutional protections afforded persons accused of criminal acts, it is only in the current period that the issue of applicability within the juvenile court has come to the fore.

Basically the question now comes down to the issue of whether the exclusionary rule made applicable to states in

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[1] Ibid., sec. 703-8.

[2] In 1967 2,706 cases were so handled in the Cook County juvenile court system. Valukas, "The Juvenile Court," p. 355.

Mapp v. Ohio[1] may be used to exclude from the consideration of the juvenile court evidence seized by the police in an unreasonable search and seizure. The protection is fully applicable in the juvenile courts if two recent state appellate decisions make the correct inferences from the decision in the Mapp and Gault cases taken together.

In Illinois the issue was resolved in the decision of the state Supreme Court in In re Marsh.[2] There the juvenile had been arrested as he left a building in which gun shots had been reported. A search showed him to possess a "zip" gun, and this was later used as the evidentiary basis for the revocation of his delinquency probation and subsequent commitment to the Illinois Youth Commission. The Illinois high court specifically ruled that the exclusionary rule was applicable to proceedings under the juvenile court act; the critical search was, however, found valid in view of the general rule that a search of the person is reasonable if done incident to an arrest made with probable cause. The juvenile's probation revocation and commitment was thus affirmed. A New York appellate court has reached much the same conclusions.[3]

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[1] 367 U.S. 643 (1961).

[2] 40 Ill.2d 53, 237 N.E.2d 529 (1968).

[3] In re Williams, 49 N.Y. Misc.2d 154, 267 N.Y.S.2d 91 (1966).

These decisions have sufficient surface merit that they are likely to be persuasive upon other jurisdictions. In that event, future juvenile court disputes on the point are likely to relate to enforcement rather than applicability of the protection.

Self-Incrimination

Closely related to the issue of search and seizure, both in points of time in the arrest process and with respect to constitutional requirements is the protection against self-incrimination. The clear language of the Gault case makes applicable to delinquency proceedings the rule that a right against compulsory self-incrimination exists and that no waiver of that right is effective unless voluntary in every sense and knowingly made. This is a matter of considerable significance to the administration of juvenile justice because part of the rehabilitative goal of the juvenile justice process is having the offending youth admit the error of his ways and thereby give verbal atonement for his anti-social action.[1] This is one basis for agreeing with Monrad Paulsen that:

> A child's right to silence during interrogation, preliminary investigation, and the hearings in court could bring the single most drastic change

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[1]Bertram Polow, "The Juvenile Court: Effective Justice or Benevolent Despotism?" American Bar Association Journal, LIII (January 1967), 34.

> in juvenile court proceedings, if the right is frequently invoked with the help of vigorous counsel.[1]

Be that as it may, Gault can be interpreted only as declaring that the right exists for accused delinquents. Indeed, it will be recalled from the analysis of that decision that the court took cognizance of the fact that guarding juveniles against confessions that were not knowingly voluntary might require even more precautions than were mandated for adults.

In two recent Illinois high court cases dealing with this matter, the general applicability in the juvenile courts of the rule against self-incrimination was regarded as established,[2] but the spontaneous confession volunteered in a separate case by a juvenile was deemed obtained within the Miranda formula[3] and so was held admissible.[4]

The Illinois legislature resolved the issue in 1969 with an amendment to the juvenile court statute requiring the application in delinquency proceedings of the same rules

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[1]Monrad G. Paulsen, "Juvenile Courts and the Legacy of '67," Indiana Law Journal, XLIII (Spring, 1968), 543.

[2]In People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968), the Illinois Supreme Court ruled Miranda had prospective application only but implied that its authority would be appropriate for confessions used in criminal courts with respect to juveniles, just as for adults.

[3]See Miranda v. Arizona, 384 U.S. 346 (1966).

[4]In re Orr, 38 Ill.2d 417, 231 N.E.2d 424 (1967).

of procedure used in criminal proceedings. The law reads:

> At the adjudicatory hearing [to establish delinquency] . . . the rules of evidence in the nature of criminal proceedings in this State are applicable, . . .[1]

This would seem to require a Miranda warning to be given those juveniles arrested by the police whose action might lead to a delinquency petition being filed against them or who may be transferred to criminal court at some later time. Because these events are not predictable at the time of arrest, the prudent course would seem to be a universal practice of giving a Miranda warning regardless of the age of the accused or of the offense with which he is allegedly connected. This is not to say that such action will be sufficient in all cases but that this would appear necessary to meet the minimum requirements of Miranda. Pre-trial confessions of juveniles in New York[2] and California[3] have received similar judicial interpretations and essentially the same results have been obtained as effectuated by the 1969 Illinois statute revision.

Expanding the Miranda rule, the President's Commission on Law Enforcement has recommended referral of juveniles to counsel as a matter of course rather than mere advisement

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 704-6.

[2] In the Matter of Rust, 53 N.Y. Misc. Rep.2d 51, 278 N.Y.S.2d 333 (1967).

[3] In re Acuna, 245 Cal. App.2d 388, 53 Cal. Rptr. 884 (1966).

of their right to attorney representation. The commission's remarks on this issue are presented in a forthright manner going well beyond the requirements of either Gault or Miranda:

> There is no single action that holds more potential for achieving procedural justice for the child in the juvenile court than provision for counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires . . .
>
> The need for counsel is not confined to the adjudicatory stages of the proceeding. Both at intake and at disposition, counsel is crucial. . . . Counsel should be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent.[1]

The commission apparently was of the view that children cannot competently waive their constitutional rights, including the protection against self-incrimination, absent advice of counsel.[2] Counsel would bring to the pre-trial period an assurance of constitutionally competent decisions by the juvenile on the issue of waiver of the self-incrimination protection. His role would not necessarily be limited to this one area, however, as he could also argue the case for pre-trial release to parents or other adult authority, demand procedural conformity with statutory requirements, and in general bring to the entire procedure a regularity

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[1]Task Force Report, pp. 32-34. Emphasis added.

[2]For additional comment, see Suria and Bassiouni, "The Illinois Juvenile Court Act," p. 123.

and formality necessary to protect the interests of his client.[1]

Under the procedure suggested by the President's Commission on Law Enforcement, the arrested youth would, at the earliest feasible time, be placed in contact with an attorney who would then explain the nature of the proceeding and the protections available to the person accused of law violation. Although Illinois,[2] California,[3] and New York[4] make provision for the appointment of counsel prior to the adjudicatory hearing, no state is reported to have a statutory requirement that this be done as a matter of course requiring no request by the juvenile or his parents.

New York does, however, have a procedure which seems to be working in just that way. The New York law includes an entire section dealing with the establishment of a system of permanent "law guardians," appointed by the court to serve as legal aids to those persons subject to the jurisdiction of the family court under delinquency, neglect

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[1]For additional comment on the pre-trial role of attorneys, see Robert J. Reinhold, "The Role of the Attorney in Juvenile Court Intake Processes," St. Louis University Law Journal, XIII (Fall, 1968), 82-88, and Margaret K. Rosenheim and Daniel L. Skoler, "The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings," Crime and Delinquency, XI (April, 1965), 167-174.

[2]Ill. Rev. Stat. (1969), c. 37, sec. 701-20.

[3]Cal. Wel. and Inst. Code, sec. 634 (West 1966).

[4]N.Y. Family Court Act, sec. 249 (McKinney 1963).

or PINS petitions.[1] The incidence of attorney presence in New York family courts has increased greatly through this system of regularized compensation and by making readily available legal assistance.[2] Of direct relevance to the commission's recommendations is a report that New York family courts now appoint lawyers, or "law guardians" without first attempting to solicit waivers from the juveniles.[3] To the degree that the report is accurate for all of New York, that state would appear to have provided the maximum of pre-trial legal protections presently available to any youth subject to juvenile court adjudication.

Pre-Trial Custody and Bail

A right to bail before, during, and after the adjudicatory hearing has not been a common feature of delinquency proceedings[4] and is still a matter on which the

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[1] N.Y. Family Court Act, sec. 241 (McKinney 1963).

[2] Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," Lawyers in Juvenile Courts (Chicago, Illinois: National Council of Juvenile Court Judges, undated), p. 56.

[3] Valukas, "The Juvenile Court," p. 359.

[4] In 1965 nine states had statutory provisions giving to juvenile courts authority to grant bail. They were Alabama, Arkansas, Colorado, Georgia, Massachusetts, Michigan, North Carolina, South Dakota, and Wyoming. Illinois, Iowa, and Washington had provisions implying that a right to bail existed for juveniles. Eleven states had provision that bail shall not apply and the remaining twenty-seven states made no statutory mention of the matter of bail in juvenile courts. "The Right to Bail and the Pre-Trial Detention of Juveniles Accused of Crime," Vanderbilt Law Review, XVIII (October, 1965), 2099.

requirements of the federal Constitution are unclear. Indeed there is no wide consensus as to whether bail should be a part of the system of juvenile justice. A characteristic view of those opposing its use was expressed by Judge Walter Dahl of the Cook County Juvenile Court when he expressed concern over the possibility that the juvenile would interpret the granting of bail as buying his way out of trouble.[1] To some degree, however, such views are vitiated by reports of excessive pre-trial detention of juveniles for the most minor of offenses.[2] It has been reported that thousands of California youths were being detained for incidents involving truancy, curfew violations, traffic violations, and in one case for jaywalking. Calling such practice "shocking," the California Governor's Commission urged that strict limits on pre-trial detention be instituted although no bail provisions were recommended in the commission's report. It has been argued that the use of bail may alleviate the many instances of unwarranted detention by juvenile courts.[3] Neither the Standard

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[1]Stephen A. Rothman, "How the Juvenile Court Protects Minors in Juvenile Court," Chicago Sun Times, May 29, 1966, p. 40.

[2]Cal. Gov. Comm. Report Pt. I, pp. 41-42.

[3]Chester James Aniteau, "Constitutional Rights in Juvenile Courts," Cornell Law Quarterly, XLVI (Spring, 1961), 387-415.

Juvenile Court Act[1] nor the Children's Bureau,[2] however, have found this view convincing. The Standard Juvenile Court Act specifically recommends that bail not be utilized in juvenile courts.[3]

Generally, appellate courts have been reluctant to extend this right to juvenile court proceedings when the issue was presented.[4] Similar rulings have been common when the issue was bail pending appeal from a juvenile court decision.[5] With some exceptions[6] such was the general pattern until 1960 when a federal court extended the right to juveniles being detailed for juvenile court action under the federal law operative in the District of Columbia.[7]

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[1]S.J.C.A., p. 40.

[2]Standards, p. 63.

[3]S.J.C.A., p. 40.

[4]For general comments on lack of applicability of right to bail pending juvenile court action, see the following: Ex parte Newkowsky, 94 N.J.L. 314, 116 A. 716 (1920); In re Magnuson, 110 Cal. App.2d 73, 242 P.2d 362 (1952); Am. Jur., "Juvenile Courts," sec. 57; and 160 A.L.R. 286.

[5]See Gray v. Webster, 122 Wash. 526, 211 P. 274 (1922), and Espinosa v. Price, 144 Tex. 121, 188 S.W.2d 576 (1945).

[6]For example, see State v. Franklin, 202 La. 439, 12 S.2d 211 (1943).

[7]Trimble v. Stone, 187 F. Supp. 483 (D.C.D.C. 1960). For law review comment on this case, see John R. Stafford, "Constitutional Law -- Eighth Amendment as Guaranteeing to Juveniles a Right to Bail Pending Hearing in Juvenile Court -- Trimble v. Stone," George Washington Law Review, XXIX (March, 1961), 583-589.

Presented squarely with the constitutional issue of right to bail, the court called this a "fundamental right" not to be denied merely because the petitioner was being dealt with in civil as opposed to criminal proceedings. Only time will tell whether a similar holding will be made as to bail under state delinquency laws because such a holding under the Eighth Amendment is not automatically operative against the states by virtue of the Fourteenth.

Illinois presently makes no specific provision for bail in juvenile court proceedings. The Illinois Constitution, without limiting language as to the type of adjudication, extends the right to bail to "all persons" except those charged with a capital offense in which the proof is evident or the presumption great.[1] In a 1966 decision the Illinois Supreme Court interpreted the bail provision as designed to implement the assumption that a person accused of a crime is presumed innocent until proven guilty and thereby secure his liberty while providing the state with some assurance he will appear for trial.[2] When it is remembered that recent appellate decisions have weakened the non-criminal base of juvenile courts, the Illinois Supreme Court interpretation may portend future constitutional difficulties for the juvenile court statute in so far as it

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[1]Illinois, Constitution (1870), art. II, sec. 7.

[2]People ex. rel. Gendron v. Ingram, 34 Ill.2d 623, 217 N.E.2d 803 (1966).

makes no specific provision for the granting of bail to juveniles.[1]

The California situation is much like that in Illinois on this point. Although no bail provision exists for juveniles in juvenile courts, he may be released to the custody of his parents or guardian.[2] This procedure has been given judicial sanction by a California appeals court.[3]

New York does have a specific bail authorization. Its statute makes provision for the release of youths brought before the court on a delinquency petition with or without recognizance of an adult, and grants to the family court authority to fix or accept bail from adults or children to secure their attendance at a court hearing.[4]

The United States Supreme Court did not in In re Gault or any of the other cases involving juvenile courts, pass on the availability of bail. As with all the pre-trial phases of the juvenile court process, excepting right to adequate notice, application of the Supreme Court ruling must arise from implication and projection into future cases.

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[1]See Suria and Bassiouni, "The Illinois Juvenile Court Act," p. 121. The 1965 statute revision in Illinois eliminated earlier implication that bail might be available.

[2]Cal. Wel. and Inst. Code, sec. 626 (West 1966).

[3]In re Castro, 243 Cal. App.2d 402, 52 Cal. Rptr. 469 (1966).

[4]N.Y. Family Court Act, sec. 728 and sec. 153 (McKinney 1969-70 Supp.).

Accepting the language in Trimble describing bail as a "fundamental right" and the opinion expressed in Gault that juvenile courts are to be equated with adult courts at least in so far as some constitutional rights are concerned, one has some evidence for concluding that to the degree that bail is available in criminal courts, it has applicability to juvenile courts as well.[1]

Preliminary Conference And Informal Probation

At any time in Illinois prior to the filing of a formal petition, there may be held what is labeled a "preliminary conference" with a view toward disposing of the case without formal court action.[2] Participation by the alleged delinquent in this procedure is on a voluntary basis. The probation officer, who conducts such hearings, is not authorized to coerce cooperation and may not force attendance, compel production of papers, or require visits to any place. He may, within the rules of the court, continue his efforts at adjustment for a period of not more than three months.

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[1] The Eighth Amendment protection against "excessive bail" is applicable upon state proceedings. Pilkington v. Circuit Court, 324 F.2d 45 (8th Cir. 1963).

[2] Ill. Rev. Stat. (1969), c. 37, sec. 703-8. This may not be used to lengthen the period of temporary custody of the child nor may it prevent the filing of a petition by any person who wishes to do so.

During this period a kind of "informal probation" takes place wherein the alleged delinquent may be in possession of his freedom or, instead, be free only to the extent specified by the probation officer.

In Illinois the percentage of cases handled in pre-judicial fashion through the preliminary conference is considerably lower than the national average. In 1967 only 911 cases were disposed of in this manner as compared with 8,741 delinquency cases.[1] In Cook County in that year 7,361 delinquency cases were judicially disposed of and in the same period only 22 delinquency cases were handled "non-judicially." In Winnebago County, on the other hand, there were 281 official delinquency cases handled and 349 "non-judicial" dispositions. Apparently there is wide variation within Illinois courts as to implementation of the preliminary conference to dispose of such delinquency matters. A juvenile court judge in Cook County has explained that the presiding judge of the juvenile court determines which kinds of cases may be handled in a pre-judicial or "non-judicial" fashion.[2] The area subject to such action would seem comparatively narrow in Cook County.

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[1]The Children's Bureau reported in 1967 that 54 per cent of the delinquency cases referred to juvenile courts throughout the United States were handled without invocation of the court's formal jurisdiction through petition or motion. Juvenile Court Statistics 1967, p. 16.

[2]Dunne, "14th Amendment," p. 67.

California and New York have made provision for the use of the preliminary conference to dispose of delinquency cases. The New York statute is very much like that of Illinois and is designed to "sift out" those cases not requiring formal judicial action.[1] The probation officer in California may utilize informal probation, in lieu of filing a petition, for up to six months rather than the maximum of three months in Illinois and New York.[2]

The informal adjudicatory procedure used in Illinois conforms to what the President's Commission on Law Enforcement deems desirable in these matters,[3] except that Illinois does not regard the acceptance of the informal probation as precluding further proceedings based upon the same act of the juvenile. This would eliminate any coercive power the probation officer might have in enforcing the informal probation and avoid the problems associated with "treatment without trial."[4] Once the un-official probation program was agreed to, under the procedures suggested by the President's Commission, authority to file a delinquency petition on the original action by the juvenile would no longer be available and any subsequent delinquency petitions

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[1]N.Y. Family Court Act, sec. 734 (McKinney 1963).

[2]Cal. Wel. and Inst. Code, sec. 654 (West 1966).

[3]Task Force Report, pp. 16-17.

[4]Paul W. Tappan, "Treatment without Trial," in The Problem of Juvenile Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), pp. 290-296.

against him would have to be based on action other than that which caused his original appearance before the court.

Specificity of Charges

Problems surrounding the requirement for specific charges in delinquency cases are much more troublesome than the issues involved in preliminary conferences. Basically there are two aspects of the problem of specificity of charges in juvenile matters. Before juvenile court proceedings can commence there must have been filed a petition[1] alleging the dependency, neglect, delinquency, or need of supervision of a particular youth. In the past this petition was not required to include the charges on which the youth was to be adjudged. With the filing of a petition comes the second area of concern related to the specificity of charges: adequate notice to the child and his parents of the time, place, and nature of the proceeding. Because the filing of a petition occurs in time before notice is given, this process may be considered first.

A 1958 study of selected juvenile courts found that of the twelve courts then examined, ten regularly set out the specific nature of the charges in the delinquency petitions

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[1]Apparently most juvenile court statutes use the term "petition" as the formal filing device to initiate official court action. See, for example Ill. Rev. Stat. (1969), c. 37, sec. 704-1, N.Y. Family Court Act, sec. 731 (McKinney 1963), and Cal. Wel. and Inst. Code, sec. 630 (West 1966).

before the juvenile court.[1] Illinois was one of the states which did not. The Illinois practice was to allege that a particular juvenile was within one of the categories set forth in the family court law as susceptible to court adjudication, and not to include the specific acts or circumstances that led to such conclusion. Presumably these matters would come out at the hearing.

The Illinois procedure in this period preceeding the recent "legalization" of the juvenile justice system, had some support in appellate court decisions, both in this state and elsewhere. Judge Julian Mack justified this

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[1] Juvenile Court Proceedings in Delinquency Cases (Illinois Legislative Council, Bulletin 3-122; Springfield, Illinois: Illinois Legislative Council, 1958), p. 5.

[2] In the case of People ex. rel. Mahnke v. Nowicki, 270 Ill. App. 611 (1933), the Cook County Circuit Court ordered that only an abstract of the case be printed giving no information in the Illinois Appellate Reports on the opinion of the court. The Illinois Legislative Council in Juvenile Court Proceedings in Delinquency Cases at page 6, and Benjamin E. Novoselsky, "Family Courts," Illinois Bar Journal, XLVI (March, 1958), 618, reported that the court approved the general method of alleging delinquency and thus did not require specific charges to be made. Apparently these sources had access to the opinion of the court which is not available to the writer. It should also be noted that each of these sources reported the case as People v. Mahnke rather than People ex. rel. Mahnke v. Nowicki as it reads in the Illinois Appellate Reports. No explanation for this discrepancy is available.

For other appellate decisions reaching similar conclusions, see Moore v. State, 111 Tex. Cr. 461, 14 S.W.2d 1041 (1929), and In re James L., 24 Ohio Op.2d 369, 194 N.E.2d 797 (1963).

practice saying that since juvenile courts were to deal with the "whole person" and not merely to determine "guilt" or "innocence," it necessarily followed that the petition need not include specific details but could simply allege his incorrigibility or other general characteristic.[1]

Contrary to Judge Mack's position, other courts have tended to view lack of specificity of charges as grounds for reversal. An Indiana appellate court provided the following rationale for such a holding:

> Juvenile court procedure has not been so far socialized and individual rights so far diminished that a child may be taken from its parents and placed in a state institution simply because some court might think that to be in the best interests of the state. . . . Some specific act or conduct must be charged as constituting the delinquency and the truth of the charge must be determined in an adversary proceeding.[2]

This view is interesting in that it indicates the necessary connection between accepting the juvenile courts as basically non-punitive and accepting the oft-quoted statements advocating relaxation of procedural requirements. Quite clearly, the Indiana court was concerned about the possible adverse consequences of adjudication of delinquency and, as such, required from the juvenile courts specificity of charges in the delinquency petition which would enable the

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[1]Julian Mack, "The Juvenile Court," Harvard Law Review, XXIII (December, 1909), 104-122.

[2]In re Coyle, 122 Ind. App. 217, 218, 101 N.E.2d 192 (1951).

child and his parents the time and information necessary to answer the charges.

As the march toward "legalization" of juvenile courts has continued, a number of writers have indicated views similar to those expressed by the Indiana court. Sheldon Glueck, prolific writer in the field of juvenile delinquency, has supported efforts to make more specific the allegations in a petition.[1] The following quotation illustrates the problems associated with the use of general as opposed to specific charges in juvenile court petitions:

> Without a definite charge of a particular offense, rules of relevancy of evidence become impossible to apply; anything that the juvenile may be alleged to have done that would reflect badly on his character becomes "relevant" to such vague standards. Without specific charge the juvenile has no opportunity to know with what accusations he is charged and hence is deprived of the right to marshal evidence in his defense.[2]

Even where the charges are generally known to the youth and his family and are denied, information about the specific nature of the allegations would seem essential for the preparation of an adequate defense. Certainly, where the juvenile and his family have no information regarding the basis for the charges, they could not adequately prepare for the

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[1]Sheldon Glueck, ed., The Problem of Delinquency (Boston, Massachusetts: Houghton Mifflin Co., 1959), pp. 323-324.

[2]Stephen M. Herman, "Scope and Purposes of Juvenile Court Jurisdiction," Journal of Criminal Law, Criminology and Police Science, XLVIII (March-April, 1958), 594. See also Aniteau, "Constitutional Rights," p. 395.

hearing. The Task Force Report of the President's Commission on Law Enforcement found that there was no reason not to furnish the parties with a "definite and detailed" petition if they were to have a meaningful opportunity to meet the case against them.[1]

Under Illinois law the petition must allege that the juvenile is neglected, dependent, delinquent, or otherwise in need of supervision and set forth the "facts" that he is a youth within the meaning of the statute.[2] The "facts" in a delinquency petition might merely be a statement that the juvenile has violated a state law.[3] This is mitigated somewhat in Illinois by the fact that the attorney appearing for the juvenile may request a bill of particulars, and that the juvenile court judges may demand specificity of charges in the petitions filed in their courts.[4] The Cook County Juvenile Court was, in 1966, thus requiring the state's attorney to set forth the specific charge against the alleged delinquents and did not allow such general charges as violating "a state statute."[5]

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[1] Task Force Report, p. 36.

[2] Ill. Rev. Stat. (1969), c. 37, sec. 704-1.

[3] Marshall J. Hartman, "Trying a Delinquency Case in Juvenile Court," Illinois Bar Journal, LV (December, 1966), 295.

[4] Ill. Rev. Stat. (1969), c. 110, sec. 37.

[5] Rothman, "How the Juvenile Court Protects Minors," p. 40.

In New York the legislature has accomplished by statute the same result which the Cook County Juvenile Court decreed by court administrative requirement.[1] In that state any delinquency petition must include a "concise statement of alleged delinquent acts." In a similar fashion, the California statute requires the petition to contain a statement of facts to support the conclusion that the minor is a person within the scope of the act.[2]

Contrary opinions notwithstanding, the Gault case does not require that the delinquency petition itself set forth in detail the actions alleged to have been committed by the juvenile which caused him to be brought within the jurisdiction of the court.[3] On the issue of specificity of charges, Justice Fortas confined his remarks to the process by which the parents of the juvenile are notified of the allegations against their child. Specifically he said:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity."[4]

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[1]N.Y. Family Court Act, sec. 731 (McKinney 1963).

[2]Cal. Wel. and Inst. Code, sec. 656(f) (West 1966).

[3]For view that Gault did make such specificity in the petition a mandatory requirement, see William J. Linklater and Robert J. Zana, "Constitutional Law - Due Process - Juvenile Courts: Specific Due Process Guarantees Extended to Accused Delinquents in State Juvenile Court Proceedings," Illinois Bar Journal, LVI (December, 1967), 333.

[4]In re Gault, 387 U.S. 1, 33 (1967).

There is nothing in this opinion to prevent a petition indicating only general charges of "law violation" as long as some regularized procedure exists for informing the parents and the juvenile of the specific nature of the allegations.[1] If delivery of the petition is the only method of notification, it would have to meet the particularity or specificity requirement of Gault, but if other more specific documents could be attached to the notice given to the juvenile and his parents, conceivably the petition, which might be open to public scrutiny, could still be couched in general terms for the protection of the juvenile. Had other regularized formal notification procedures been utilized to give adequate notice in the Gault case, the use of a petition containing only allegations that a law was violated would probably not have been held unconstitutional.

Even during the pre-Gault period when appellate courts were permitting considerable relaxation of procedural requirements, a number of decisions viewed the service of notice as essential to establishing juvenile court jurisdiction.[2]

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[1]Although Justice Fortas did not explicitly require notice to be given to both the juvenile and his parents, authoritative sources have so interpreted his opinion. See Am. Jur., "Juvenile Courts" (1968 Supp.), sec. 64.

[2]People ex. rel. McEntree v. Lynch, 223 Ill. 346, 79 N.E. 70 (1906), Moore v. State, 111 Tex. Cr. 461, 14 S.W.2d 1041 (1929), Oversmith v. Lake, 295 Mich. 627, 295 N.W. 339 (1940). For later Illinois case holding notice to be essential to establish jurisdiction, see People v. Harris, 343 Ill. App. 462, 99 N.E.2d 390 (1951).

Indeed, inadequate notice of pending juvenile court action has perhaps provided more appellate reversals than any other single procedural point.[1] It was reported in 1932 that most if not all statutes had provisions for notification of parents and/or of the juvenile of impending proceedings, and in light of recent emphasis upon procedural regularity in appellate courts, scholarly articles, and statute revisions, such notification requirements are no doubt now more forceful in content and wider in application than in 1932.[2]

In so far as the Gault decision affected the notice requirements, in most jurisdictions impact was not so much to requiring notice as it was to make mandatory the inclusion of specific allegations within the notice or other communication from the juvenile court.

Under the present juvenile court statute in Illinois, the juvenile court transmits a summons along with a copy of the petition to the minor and to each person named as a respondent in the petition, which normally includes parents

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[1] Procedure and Evidence in Juvenile Court (Chicago, Illinois: National Council on Crime and Delinquency, 1962), pp. 10-11. See also 76 A.L.R. 242.

[2] In one holding, of interest for the contrast it provides to the majority of rulings in the earlier period, the Missouri Supreme Court in 1931 held that although notice to parents was required in dependency or neglect proceedings, this was not required in delinquency cases because the issue there was between the child and the state and of no direct concern to the parents. Ex parte Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931).

or guardian.[1] This must be done at least three days prior to the date set for the court appearance. Since no other documents are provided for in the Illinois statute, it would seem that the proper method for meeting the specificity requirements of Gault would be to provide for specific allegations within the petition itself.

On the issue of waiver of right to notice, the Supreme Court said in a footnote to the Gault decision that because the family had not been advised by counsel, nor been told of their right to one, their appearance in court could not constitute valid waiver of notice.[2] Within these bounds, there remains the possibility of waiver of right to formal written notice if it is done with full cognizance of available procedural protections. Under what circumstances these requirements would be met, the court did not speculate except that right to counsel must be explained to the respondents. Under Illinois requirements, this advice is given at the first appearance before the court, and included within the summons.[3] Assuming that the juvenile and his parents knowledgeably and voluntarily waive their rights at the first hearing, there would seem to be no prohibition in the Gault case against including in this waiver the right

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 704-3.

[2] In re Gault, 387 U.S. 1, 34, note #54 (1967).

[3] Ill. Rev. Stat. (1969), c. 37, sec. 701-20(3) and sec. 704-3(2).

to written notice. Given the court's concern, however, over the "special problems" associated with juvenile waiver of rights, juvenile court officials would perhaps be wise to provide written notice as a matter of course.[1]

Indictment by Grand Jury

The final point to consider in the pre-trial procedures -- asserted rights to grand jury indictment -- requires but brief comment as the state appellate court decisions appear to be unanimous in their denial of any such right. The Fifth Amendment to the federal Constitution requires indictment by grand jury in capital or "otherwise infamous crime[s]," [2] although this provision has never been held applicable to state criminal procedures under the due process clause of the Fourteenth Amendment.[3] State constitutional provisions as to grand jury indictment have also generally been held to have no applicability to juvenile proceedings.[4]

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[1]California requires notice to be given to parents, Cal. Wel. and Inst. Code, sec. 658 (West 1970 Supp.), as does New York, N.Y. Family Court Act, sec. 724 (McKinney 1963).

[2]U.S., Constitution, amend. V.

[3]Hurtado v. California, 110 U.S. 516 (1884), and Lem Woon v. Oregon, 229 U.S. 586 (1913). See also Am. Jur., "Grand Jury," sec. 3.

[4]For example, see Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915). For general comment, see Aniteau, "Constitutional Rights," p. 393.

Because of the direct applicability of the Bill of Rights upon all federal courts, the federal juvenile delinquency statute is in a different constitutional position than those existing under state auspices. The statute covering cases arising under this act[1] specifically excludes grand jury indictment. This exclusion and rationale seem invalid, as will appear more clearly from a later discussion of an identical limitation of the right to jury trial.[2]

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[1]18 U.S.C. sec. 5031 (1964).

[2]See below at page 248.

CHAPTER VI

TRIAL PROCEDURES

Writers dealing with juvenile courts usually eschew using the term "trial" when discussing the adjudication proceeding in which the facts of a case are examined with a view toward determining whether or not the juvenile should be subjected to the treatment programs available through the court. The reason for utilizing terminology different from that which is common in other courts is to provide symbolic points of differentiation between them and the juvenile courts. The description frequently seen is "adjudicatory hearing." "Trial" is the term used here to emphasize that the procedures followed in delinquency cases at least are, in accordance with the Gault decision, not in fact sui generis. Objections that the term "trial" necessarily brings to bear all the implications of a criminal proceeding may best be met by pointing out that recent Supreme Court decisions have discredited opinions viewing the adjudication process as one merely concerned with an adjudication of status, and not related to finding guilt and imposing penalties.

Public v. Private Trials

One of the first points to be decided about the conduct of the trial revolves around the issue of private

versus open or public proceedings. Without doubt, the weight of tradition in juvenile justice lies in favor of closed or private proceedings excluding all but those who have a direct interest in the decision of the court. The case for private hearings was well stated by Herbert Lou:

> These [privacy] provisions are prompted by a tender solicitude to save the child and his parents from embarrassment and the taint of any public stigma, and by a belief that a private hearing affords much more favorable conditions than a public hearing for finding out the facts and causes of the child's troubles and for determining the proper remedy.[1]

Supplementing this reasoning, the Standard Juvenile Court Act has noted that extensive publicity may actually encourage other potential delinquents, in seeking notoriety, to engage in actions designed to propel them into the public spotlight.[2] In a brief but often cited article on this subject, Gilbert Geis, Professor of Sociology at California State College, concluded that:

> . . . a policy of unfettered publication of the names of juvenile felons may very likely cause more social and individual harm than it eliminates. Certainly, in terms of the implications of correctional policies current today, publication as an instrument of deterrence seems to be a short-sighted policy.[3]

The opposing point of view is only occasionally encouraged

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[1]Herbert H. Lou, Juvenile Courts in the United States (Chapel Hill, North Carolina: University of North Carolina Press, 1927), pp. 131-132.

[2]S.J.C.A., p. 67. Also see Standards, pp. 76-77.

[3]Gilbert Geis, "In re: Juvenile Court Publicity," Juvenile Court Judges Journal, XVI (Spring, 1965), 15.

or put into practice,[1] and it may be concluded that the overwhelming majority of writers on the subject favor private juvenile court proceedings.[2]

Following recommended practice, Illinois excludes the general public from juvenile court hearings but qualifies this exclusion by excepting the news media.[3] Similarly, juvenile arrest records may not be disclosed except by court order,[4] and court files are closed to the general public.[5] There are no specific statutory prohibitions against the printing of the details of a case in the newspapers, although it is generally conceded that the judge has authority to so prohibit.[6]

Gilbert Geis has pointed out that judges may be subjected to pressures urging public disclosure of names in juvenile delinquency trials, particularly where judges serve

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[1]In the early 1960's a Montana juvenile court judge instituted an exposure practice. See Donald J. Giese, "Judge Loble's Experiment with Juveniles," Catholic Digest, XXVII (March, 1963), 14-19. Subsequently his claimed positive results were challenged as statistical manipulations. "Open Hearings in Juvenile Courts in Montana," Juvenile Court Judges Journal, XVI (Spring, 1965), 16-20.

[2]See Task Force Report, p. 41.

[3]Ill. Rev. Stat. (1969), c. 37, sec. 701-20(6). The judge may also admit representatives of agencies or groups who have a direct interest in the case or in the work of the court.

[4]Ibid., sec. 702-8(3).

[5]Ibid., sec. 702-10.

[6]Robert L. Winslow, "Refusal to Modify Court Rule that Names of Juveniles be withheld from Press," Crime and Delinquency, XIV (July, 1968), 267.

at the will of the public.[1] Because Illinois circuit court judges and associate judges must periodically stand for re-election, and because magistrates serve at the pleasure of circuit judges,[2] the presiding officials in Illinois juvenile courts are potentially subject to the pressures described by Professor Geis. This would seem, however, somewhat mitigated by the fact that Illinois judges seeking re-election run on their record without opposition. Apparently this problem has not materialized to any great extent in Illinois.

The New York[3] practice is much like that of Illinois, but the California[4] law provides for a public trial on the request of the juvenile or his guardian. Clearly the authors of the California statute were concerned that the respondents have the right to a public trial if they so desire.[5] New York provides for the exclusion of the general public at the discretion of the court but does permit entrance to representatives of "authorized agencies." As with Illinois, New York has included no procedure by which the juvenile can request a public trial. Perhaps the most

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[1]Gilbert Geis, "Publicity and Juvenile Court Proceedings," Rocky Mountain Law Review, XXX (February, 1958), 17.

[2]Illinois, Constitution (1962 amend.), art. VI, sec. 11.

[3]N.Y. Family Court Act, sec. 741(b) (McKinney 1963).

[4]Cal. Wel. and Inst. Code, sec. 676 (West 1966).

[5]See Cal. Gov. Comm. Report Pt. I, p. 24.

prudent procedure would be to provide a standard for the general exclusion of the public with the exceptions of "friends of the court" but also to include some means by which the juvenile or his parent or guardian might request and receive an open public trial.

A right to public trial is commonly regarded as established in the ordinary courts under guarantees embodied in the typical state constitution,[1] and likewise by the thrust of the Bill of Rights and Fourteenth Amendment to the national Constitution.[2] There has been no appellate court action extending this right to juvenile proceedings.[3] It was not until 1944 that a recorded decision on the issue was rendered. In a Texas delinquency proceeding the juvenile court refused to sustain the objections of the juvenile's attorney pertaining to the exclusion of the public and ordered the proceeding to be held in private. The Supreme Court of that state upheld the procedure on the basis of its non-criminal nature and because the child was thereby

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[1] Am. Jur., "Criminal Law," sec. 257.

[2] Although the highest court has ruled the right to a public trial not to be direct applicable on state criminal proceedings, Gaines v. Washington, 277 U.S. 81 (1928), the due process requirement of the Fourteenth Amendment may invalidate adult judicial proceedings in which the right was denied, In re Oliver, 333 U.S. 257 (1948).

[3] See Am. Jur.2d, "Juvenile Courts," sec. 48.

protected from unwarranted public scrutiny.[1] As with other areas untouched by the Gault case, the matter must be considered as unsettled.

Through the requirement that the general population "shall" be excluded from juvenile court procedures, the Illinois statute rests in a vulnerable position should the right to a public trial be expanded, either under the national or state constitution, to include delinquency trials. Under the present Illinois Constitution, the right to a public trial is guaranteed in all criminal prosecutions.[2] As the mantle of criminality spreads over juvenile courts in Illinois, there is a corresponding increase in the doubt surrounding the absence of any provision for public trials in delinquency cases.[3]

The right to a "speedy trial," i.e., prompt disposition that does not keep the accused in limbo for a prolonged time, is to be regarded as even more fundamental than the right to a public trial. This constitutional safeguard has been made applicable to the states.[4] Juvenile courts over the years have apparently operated in a style which does not needlessly prolong disposition and hence decisions

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[1] Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

[2] Illinois, Constitution, (1870), art. II, sec. 9.

[3] See In re Marsh, 40 Ill.2d 53, 237 N.E.2d 529 (1968).

[4] Klopfer v. North Carolina, 386 U.S. 213 (1967). For general comment on the applicability of the Bill of Rights on state proceedings, see 18 L.Ed.2d 1388.

under both the national and state constitutions emphasizing the requirement of a speedy trial would create few problems.

Confrontation and Cross-Examination

The right of confrontation and cross-examination, where it exists, has broad applicability and may be necessary in dependency and neglect proceedings as well as delinquency trials. The following summarizes concisely the purpose of the confrontation right:

> The principal objective of the right of confrontation is to secure an opportunity for the accused to cross-examine the witnesses against him. To that extent, constitutional significance is accorded to the evidentiary rule against hearsay. In criminal cases, failure of confrontation typically occurs where statements of a third party are related by a witness. The impropriety lies in receiving evidence not subject to cross-examination.[1]

Such cross-examination of hearsay testimony as can take place in the typical situation referred to in the quotation, cannot get at the truth of the reported statement and can shed light, at most, on whether the testifying witness did in fact hear what he claims to have heard.

Instances of alleged violation of the right to confront witnesses in juvenile courts have most often been associated with admission into evidence of the social report of the

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[1]Norman Lefstein, Vaughn Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice: Gault and Its Implementation," Law and Society, III (May, 1969), 525.

probation officer.[1] These frequently include references to miscellaneous statements received during the officer's inquiries. At least as late as 1958, juvenile court judges frequently had access to the social report prior to the adjudicatory hearing or trial.[2] Although in some states reversals based on the use of hearsay testimony were not uncommon in the period prior to the Gault decision,[3] there is no indication that this was the usual result.[4] An Illinois appellate court in 1960 ruled that although it had long been the custom in dependency hearings for the court to avail itself of confidential reports from probation officers and public welfare officials and not make the reports a part of the record, such action constituted reversible error.[5]

Supreme Court action in 1965 settled the controversy over a right to cross-examination in the area of state criminal proceedings, doing so in terms that implicitly ban hearsay as well as more direct denials of a right to cross-

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[1]See 86 A.L.R. 1008, and 43 A.L.R.2d 1128.

[2]"Employment of Social Investigation Reports in Criminal and Juvenile Proceedings," Columbia Law Review, LVIII (May, 1958), 702-727.

[3]For example, see In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954).

[4]For example, see In re Holmes, 379 Pa 599, 109 A.2d 523 (1954), cert. den. 348 U.S. 793 (1955), and Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965), rev. 387 U.S. 1 (1967).

[5]In re Rosmis, 26 Ill. App.2d 226, 167 N.E.2d 826 (1960).

examination. In Pointer v. Texas[1] Justice Black, writing for the majority, held the Sixth Amendment's right to confront and cross-examine witnesses is a fundamental right made obligatory on the states by the Fourteenth Amendment. In the Gault decision Justice Fortas specifically extended this holding to include delinquency trials. No finding of delinquency, he held, may rest on testimony given without the right of confrontation having been observed unless there is a valid confession to support the allegations in the petition.[2] Although no reference was made by him to dependency, neglect, or MINS hearings, there is state appellate authority supporting the application of this right to such miscellaneous proceedings arising under these petitions,[3]

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[1]380 U.S. 400 (1965).

[2]Just as the respondent has the right to confront witnesses against him, so too must he have the right to receive court assistance in obtaining witnesses in his behalf. This issue was not before the court in Gault but would seem nevertheless made applicable to delinquency trials. Otherwise how could a respondent receive due process and a fair hearing if he was denied compulsory process for obtaining witnesses in his favor? The national Supreme Court ruled as much in Washington v. Texas, 388 U.S. 14 (1967), when it held the right to compulsory process to obtain witnesses to be incorporated in the Fourteenth Amendment's due process clause and applicable to state criminal trials. Since it is "fundamental" to due process, no doubt can remain about its applicability to juvenile delinquency trials. For additional comment on this issue, see Karen L. Atkinson, "Constitutional Rights of Juveniles: Gault and its Application," William and Mary Law Review, IX (Winter, 1967), 501.

[3]In re Rosmis, 26 Ill. App.2d 226, 167 N.E.2d 826 (1960).

and both the Standard Juvenile Court Act[1] and the Children's Bureau[2] recommend the granting of this right in juvenile proceedings generally.

As might be expected from Illinois court decisions which had earlier reached the same result, the 1965 alteration of the juvenile court statute leaves no doubt that the right to cross-examine witnesses exists in all proceedings under the state's juvenile court law.[3] This, when combined with the further requirement that delinquency trials must be held using rules of evidence applicable to criminal proceedings,[4] seems to meet the mandates of Gault. Moreover, with few exceptions the respondent or his lawyer has the additional right of examination of any evidence in the form of reports used by the court in the trial.

Contrariwise, New York has at this writing not included within its statute any explicit provision on the right of confrontation and cross-examination. However, Justine Polier, family court judge in New York City and writer in the field of juvenile justice, noted in a 1965 case that the right of cross-examination in New York juvenile courts was

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[1] S.J.C.A., p. 48.

[2] Standards, p. 74.

[3] Ill. Rev. Stat. (1969), c. 37, sec. 701-20(1).

[4] Ibid., sec. 704-6.

even then well protected by the "law guardians" provided in that state to assure legal assistance for juveniles.[1]

The California legislature saw fit to include the confrontation right explicitly in a 1967 amendment to the juvenile court statute.[2] The right is by those terms restricted to proceedings that would elsewhere be labeled delinquency or MINS hearings. Thus, California goes no further than Gault requires. In sum, with regard to the juvenile's right to confront and cross-examine witnesses providing evidence used at his delinquency trial, the conclusion may be properly reached that the three states examined, though different in their approach, meet present constitutional requirements as set forth in Gault.

Self-Incrimination

Part of the evidence received by a juvenile court often consists of a confession or admission by the respondent concerning his participation in the alleged action. The concept of self-incrimination thus becomes another consequential facet of the larger problem of evidentiary rules. From a practical as well as a constitutional point of view, the privilege against self-incrimination has much greater impact for delinquency trials than for dependency or neglect

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[1] In re Lang, 44 N.Y. Misc. Rep.2d 900, 255 N.Y.S.2d 987 (1965).

[2] Cal. Wel. and Inst. Code, sec. 702.5 (West 1970 Supp.).

hearings. Although the privilege can be claimed in any proceeding, and protects disclosures which could adversely be used,[1] its values are most clearly to be seen in delinquency or other hearings which are founded upon juvenile misbehavior and may result in commitment or restrictions on personal freedom.

The Fifth Amendment protection, now applicable to state proceedings, is based on two fundamentally discrete values. For one, as Dean Wigmore has observed, the trustworthiness of a confession may be affected by coercive efforts on the part of the state to elicit such admissions.[2] The privilege may thus be interpreted as an effort to increase the likelihood of reliability in confessions. The second value is even more fundamental: the value of voluntariness per se. Thus, Justice Fortas wrote in Gault:

> . . . [T]he privilege has a broader and deeper thrust [than] the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.[3]

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[1]See Malloy v. Hogan, 378 U.S. 1 (1964).

[2]John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. V (3rd ed.; Boston, Massachusetts: Little Brown and Co., 1940), sec. 822.

[3]In re Gault, 387 U.S. 1, 47 (1967).

The privilege, to be properly evaluated, must be understood in the light of both values. The mere fact that a confession is reliable does not make it constitutionally acceptable.

Until the past few years, the privilege against self-incrimination was often ruled inapplicable for juvenile courts, except that evidence obtained by these courts through a denial of the privilege could not later be used against the respondent in a criminal proceeding.[1] The denial of the privilege in juvenile courts was premised on the requirement that no criminal prosecution could occur utilizing self-inculpatory statements made while under juvenile court jurisdiction.[2] Where the complicating factor of possible transfer to criminal court did not present itself, many state appellate courts declined to find the privilege applicable to delinquency trials.[3] Where, however, a juvenile was ordered to testify in a delinquency trial and, upon his refusal to comply, was committed to a juvenile home until he did so, a California appellate court

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[1]See Gallegos v. Colorado, 370 U.S. 49 (1962), and for a full discussion on this point, see Rodger W. Pegues, "The Juvenile Offender and Self-Incrimination," Washington Law Review, XL (April, 1965), 189-201.

[2]For additional comment, see Monrad G. Paulsen, "Fairness to the Juvenile Offender," Minnesota Law Review, XLI (March, 1957), 561-563.

[3]See In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943), and In re Dargo, 81 Cal. App.2d 205, 183 P.2d 282 (1947).

reversed on grounds that the inquisitorial methods used violated the respondent's rights under the state constitution.[1]

The Gault decision eliminated such nice distinctions. In unequivocal terms Justice Fortas brought to bear on delinquency proceedings the protection against self-incrimination. He wrote:

> . . . [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination.[2]

This holding, coupled with the Miranda decision on cautions to be taken to assure that any waiver of the privilege is fully voluntary, leaves little more to be said on the subject.

The United States Children's Bureau, in its most recent set of recommendations on juvenile court operations, calls for the automatic exclusion of all statements made by a child in the pre-trial period, unless given in counsel's presence or on his advice, and for a non-waiverable right to counsel at all delinquency and MINS trials.[3] Requiring the presence of counsel at all such hearings goes further

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[1] Ex parte Tahbel, 46 Cal. App. 755, 189 P. 804 (1920).

[2] In re Gault, 387 U.S. 1, 49 (1967).

[3] U.S., Department of Health, Education, and Welfare, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts, (Pubn. No. 472; Washington, D.C.: Government Printing Office, 1969), pp. 27-28.

than is necessitated by either Miranda or Gault and may be rather slow in materializing due to practical difficulties of both a financial and personnel nature. Not only would there be difficulty in finding resources for such staffing, but the availability of qualified attorneys would also present formidable problems.

The provisions of the Illinois juvenile court statute on this issue of self-incrimination as it applies to the formal hearing are inadequate under Gault. There is no mention of a warning to be given by the court to the juvenile or his parents, but merely a ban on sanctions for failing or refusing to give testimony at the adjudicatory hearing.[1] Under the statute, moreover, although a delinquency adjudication may not be based solely upon an extra-judicial confession,[2] there is no statutory prohibition against such a finding based on testimony given in court.

It might be argued that the presence of an attorney in juvenile delinquency trials sufficiently protects the privilege against self-incrimination. Under Illinois law, the court is obliged to inform the respondent of his right to be represented by counsel and it is further provided that upon request of any party unable to afford counsel, one will

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 701-20(4).

[2] Ibid., sec. 704-6.

be appointed.[1] Conceivably such attorney representation in juvenile courts could provide adequate protection of the constitutional privilege against self-incrimination, particularly if such representation is the rule rather than the exception. Absent such legal counsel, however, the Illinois statute does not meet the requirements of Gault.

New York has supplemented its provisions for advising the juvenile of his right to remain silent with its system of "law guardians."[2] This regularized procedure for providing legal advice to juveniles in trouble with the law would seem to provide maximum protection of constitutional rights and privileges, including that of self-incrimination.

The California statute was amended in 1967 to bring into the juvenile court process the protection against self-incrimination but without the supplemental "law guardians" of New York. Under California law, the youth is advised of his right to silence when he is taken into custody and is accorded protection against coerced self-incrimination in the proceedings to establish wardship.[3] There is, however, no specific requirement calling for a second advisement of the privilege at the wardship hearing.

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 701-20(3)

[2] N.Y. Family Court Act, sec. 728, sec. 741(a), and sec. 241 (McKinney 1963). See below at page 242 for further discussion of New York "law guardians."

[3] Cal. Wel. and Inst. Code, sec. 625(c) (West 1970 Supp.)

Right to Counsel

To the vast majority of persons appearing before juvenile courts to answer allegations in the petition against them, the procedural rights and privileges they may have will at best be only vaguely meaningful to them and at worst have no meaning whatsoever. In any case, implementation of these sometimes technical but potentially significant protections requires knowledge of the legal process. Similarly intelligently based waiver may very well be impossible without proper legal advice.[1]

Such reasoning explains the series of constitutional interpretations in the early 1960's by which the Supreme Court greatly expanded the application to state criminal

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[1] Task Force Report, p. 32. For opposing view, see Joel F. Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," Wisconsin Law Review, 1965 (Winter, 1965), 1-51.

For what may be considered to be representative of the literature supporting the increased frequency of attorney representation in juvenile courts, see the following: Robert E. Furlong, "The Juvenile Court and the Lawyer," Journal of Family Law, III (Spring, 1963), 1-47; Eugene E. Siler, Jr., "The Need for Defense Counsel in the Juvenile Court," Crime and Delinquency, XI (January, 1965), 45-58; Monrad G. Paulsen, "Juvenile Courts, Family Courts, and the Poor Man," California Law Review, LIV (May, 1966), 694-716; and Paul W. Tappan, "Position Statement -- Is Counsel a Necessary or Advisable Part of Juvenile Court Proceedings?" Counsel for the Child (Chicago, Illinois: National Council of Juvenile Court Judges, 1966), pp. 6-8. For an excellent brief history of the right to counsel in juvenile proceedings, see Daniel L. Skoler, "The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings," Indiana Law Journal, XLIII (Spring, 1968), 558-582.

proceedings of the Sixth Amendment's protection of the right to representation by counsel. In the landmark case of Gideon v. Wainwright[1] the right to counsel was made constitutionally obligatory for the states and failure to provide legal representation for indigents was ruled a violation of due process of law under the Fourteenth Amendment. In Escobedo v. Illinois[2] there was an expansion of the right into such areas as pre-trial detention.

That the court's concern over attorney representation has since affected proceedings in the juvenile courts is not surprising. It is now widely accepted that attorney representation is the keystone to all other procedural guarantees. Objection to expansion of this right must necessarily be founded on the premise that protections afforded accused criminals are not needed in juvenile courts.[3]

In the pre-Gault era most appellate rulings upheld the right to retain counsel but fewer required as a constitutional mandate that the juvenile court provide advice as

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[1]372 U.S. 335 (1963). The Gideon case was concerned with a felony but in the court's opinion Justice Black referred to "defendants charged with crime," and "criminal prosecutions" rather than felony trials per se. See McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965), where the Gideon rule was applied to a serious misdemeanor.

[2]378 U.S. 478 (1964). See also Gilbert v. California, 388 U.S. 263 (1967), extending right to any "line ups" before prosecution witnesses.

[3]See above at page 96 for comment on the polemic surrounding the need for attorney representation in juvenile court.

to this right and provide counsel when the respondent could not afford one.[1] As pointed out by the Advisory Council of Judges of the National Council on Crime and Delinquency, this practice worked a disadvantage to the poor and should, on the basis of sound policy and fair administration of justice, be abandoned in favor of the practice whereby indigent respondents could have counsel assigned by the court, particularly in cases based on what were in fact felony violations.[2]

The Gault decision made moot the question of whether, as a matter of policy, juvenile court statutes should include provision for court appointment of counsel. In rejecting the contention that probation officers could be trusted to protect the rights of juveniles, Justice Fortas pointedly said:

> . . . /T/he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's

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[1]See People ex. rel. Weber v. Fifield, 136 Cal. App.2d 741, 289 P.2d 303 (1955), Lazaros v. State, 228 S.W.2d 972 (Tex. 1950), and People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956) holding that although respondent has a right to counsel, juvenile courts are not constitutionally obliged to advise him of that right, but see In re Poff, 135 F. Supp. 224 (D.C.D.C. 1955), which required that juveniles brought before a juvenile court in the District of Columbia on a charge that would constitute a crime if he were an adult, must be advised of the right to counsel, and Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956), holding that when personal liberty is at stake, juveniles must be given the same protection with respect to right to counsel as is afforded adults in criminal trials.

[2]Procedure and Evidence in Juvenile Court (Chicago, Illinois: National Council on Crime and Delinquency, 1962), p. 10.

> freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[1]

To sum up, the entire holding was that the right to counsel is guaranteed and is to be specially implemented for the indigent; and that parents are to be so advised. The juvenile court judge may not presume knowledge of the right either by the parent or the juvenile.

Even such a forthright enunciation of the right to counsel leaves some aspects of the application of the right in doubt. For example, when is a juvenile mature enough, or otherwise competent, to effect an intelligent waiver of the right to counsel.[2] And how can the court assure itself that

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[1] In re Gault, 387 U.S. 1, 41 (1967). For further comment on this point, see Nanette Dembitz, "Ferment and Experiment in New York Juvenile Cases in the New York Family Court," Cornell Law Quarterly, XLVIII (Spring, 1963), 510.

[2] See "Waiver in the Juvenile Court," Columbia Law Review, LXVIII (June, 1968), 1149-1167. It may be noted that protection of the rights of persons undergoing commitment as mentally ill produces parallel problems of safeguarding basic rights in the face of a waiver that may in fact be meaningless. For a general discussion on juvenile incompetence, see Chester James Aniteau, "Constitutional Rights in Juvenile Courts," Cornell Law Quarterly, XLVI (Spring, 1961), 406-407, and Arnold S. Trebach, "Position Statement -- What Rights to Counsel Currently Exist in Juvenile Court Proceedings?" Counsel for the Child (Chicago, Illinois: National Council of Juvenile Court Judges, 1966), p. 2.

Recognition of the inherent problem of intelligent waiver by juveniles was indicated by the Illinois Supreme Court by its promulgation of Rule 401(c) which prohibits pleas of guilty and waiver of indictment or jury trial by persons under eighteen years of age accused of a crime unless he is represented by counsel. Ill. Rev. Stat. (1969), c. 110A, sec. 401(c).

when parents effect the waiver that it is being done in the best interests of the child rather than being motivated by special interests of their own?[1] Justice Fortas did not provide guidelines in Gault for avoiding the dilemma of juvenile waiver and the opinion has been criticized on this count.[2]

Still another set of problems arise from the fact that the Gault decision was explicitly limited in its effect to delinquency procedures in which commitment to an institution of a penal nature is a dispositional possibility. This excludes those dependency, neglect, and MINS proceedings where no equivalent commitment is statutorily permissible. Yet, although commitment to industrial schools or juvenile homes may not initially be allowable in such instances, the permitted disposition -- probation, foster home placement or other important changes in living habits -- is still very restrictive and often enforced under penalty of even more severe action for any further misbehavior. For these reasons, it would appear that:

> . . . [S]ooner or later, consideration must be given to whether or not other dispositional alternatives represent such substantial curtailments of personal liberty as to warrant the same procedural protections required by possible commitment to a state training school. It is difficult to see where

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[1]George Davidson, "In re Gault: The Juvenile's Gideon," Illinois Bar Journal, LVI (February, 1968), 488 - 503.

[2]"Waiver in the Juvenile Court," pp. 1157-1158, 1167.

> the line can safely be drawn in dealing with any substantial supervision or treatment program imposed by a juvenile court.[1]

Neither Illinois, California, nor New York has thus far established a non-waiverable right to counsel in delinquency proceedings consistent with the recommendations of the President's Commission on Law Enforcement[2] and the latest Children's Bureau suggestions.[3] All three states have, however, made considerable progress in developing procedures which conform to the Gault requirements.

Illinois has long observed the right to counsel in juvenile court proceedings[4] but did not until the 1965 statute revision include the right to be advised by the court that a lawyer would be appointed if respondents could not otherwise obtain one for financial reasons and they requested such appointment.[5] In 1961 the Illinois legislature, moreover, amended the public defender statute to permit use of such personnel in juvenile courts at the discretion of the juvenile court judge.[6] This is not, however, the only

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[1]Skoler, "The Right to Counsel," pp. 563-564.

[2]Task Force Report, p. 87.

[3]U.S., Children's Bureau, Legislative Guide, p. 27.

[4]For example, see People v. Wills, 343 Ill. App. 463, 99 N.E.2d 390 (1951), and People v. Zeien, 331 Ill. App. 416, 73 N.E.2d 331 (1947).

[5]Ill. Rev. Stat. (1965), c. 37, sec. 701-20(1).

[6]Ill. Rev. Stat. (1961), c. 34, sec. 5604.

source from which Illinois juvenile courts may draw to provide attorneys for indigent respondents. Walter Dahl, Cook County juvenile court judge, is reported to have utilized legal services from the Office of Economic Opportunity and a special research project of the National Council of Juvenile Court Judges, as well as from the public defender's office.[1] It would also appear that the courts can draw on members of the bar generally. Moreover, there is no evidence of an inclination to escape assigning counsel by questioning claims of indigency. Indeed, in Cook County, which handles a great proportion of the delinquency cases in Illinois, counsel is said to be appointed as a matter of course when the offense on which the delinquency petition is based is of a "serious nature" and commitment is likely if "guilt" is proven.[2] Implementation difficulties aside, Illinois statutory provisions are within the limits described by the Gault decision on the right to counsel.

California in 1967 required juvenile court judges to insure counsel representation of juveniles brought before the court on petitions alleging either behavior that justifies a finding of what would elsewhere be labeled "delinquency" or that the juvenile is a minor in need of super-

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[1]Monrad G. Paulsen, "Juvenile Courts and the Legacy of '67," Indiana Law Journal, XLIII (Spring, 1968), 530.

[2]Anton R. Valukas, "The Juvenile Court in Operation -- Substantial Improvements Needed," Chicago Bar Record, L (April, 1969), 356.

vision, ". . . unless there is an intelligent waiver of the right to counsel by the minor."[1] Prior to 1967 the state provided a non-waiverable right to counsel in which the respondent was charged with misconduct which would be a felony if done by an adult.[2] As in Illinois the services of the public defender's office may be used by the court, or private attorneys may be appointed where public defenders are not available. Although the phrasing is different, there seems to be little substantive difference between the provisions of California and those of Illinois except perhaps that the requirement of "intelligent waiver" by the juvenile in California requires a positive action by the respondent to refuse to have counsel appointed whereas in Illinois the court appoints an attorney at respondent's request.

New York has gone even further in establishing a regularized system of providing attorneys for indigents appearing before that state's family courts. This involves a system of "law guardians," of which it has been written:

> The Family Court Act does not attempt to define the role of the law guardian. It is apparent, however, that in using the designation "law guardian" the legislature intended to indicate that the unique characteristics of the Family Court required a new concept of proper legal representation. While it

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[1]Cal. Wel. and Inst. Code, sec. 634 and sec. 700 (West 1970 Supp.).

[2]Ibid., sec. 634.

> is premature to attempt to delineate definitively the scope of this concept, I would suggest that it contemplates that the lawyer perform at least three separate functions, namely that of advocate, guardian, and officer of the court.[1]

As an advocate, the law guardian is expected to defend the best interests of his client; as guardian to weigh the legal position of his client with his personal needs; and as officer of the court to help the court reach the best disposition by providing an "independent" view. The possibility of conflicts among the three roles expected of the law guardian is more than theoretical. This may be illustrated by a California case where an appeals court was asked to rule on the claim of violation of constitutional rights resulting from the juvenile's attorney choosing to cooperate with the probation department and the juvenile court and thereby, was the claim, rendering ineffective the appellant's right to counsel.[2] Although in this instance the juvenile's claim was rejected, the case is indicative of the potential role conflict facing such a system of "law guardians." Some writers have expressed special concern about law guardians becoming captives of the court where he is

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[1] Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," Lawyers in Juvenile Courts (Chicago, Illinois: National Council of Juvenile Court Judges, undated), p. 57.

[2] In re Bacon, 240 Cal. App.2d 34, 49 Cal. Rptr. 322 (1966).

utilized on a regular basis and part of his role is expected to be played in accordance with the goals of the juvenile court.[1] Even granting the validity of such reservations, the New York system would appear to be the nation's most regularized procedure for assuring attorney representation to accused delinquents. The primary point of distinction between the New York method of providing counsel and other state provisions lies not in the presence or absence of a non-waiverable right to counsel, but rather in the regularized system of making attorneys available for those who desire their services. Even though right to counsel may be waived under New York law, there has nevertheless been reported a substantial increase in the incidence of attorney representation in that state's family court.[2]

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[1]Edwin M. Lemert, "Legislating Change in the Juvenile Court," Wisconsin Law Review, 1967 (Spring, 1967), 445-446.

[2]Monrad Paulsen has cited a report of the Judicial Conference of New York which indicated that in 1967 96 per cent of the juvenile cases examined in that state had attorneys representing respondents. Paulsen's citation of this finding is utilized here due to an inability to secure a copy of the Judicial Conference Report. Paulsen, "Juvenile Courts and the Legacy of '67," p. 528. Similarly, Jacob Isaacs found a great increase in attorney representation after the law guardian system was initiated. Jacob L. Isaacs, "Should a Right to Assigned Counsel be Established in Juvenile Court Proceedings?" Lawyers in Juvenile Courts (Chicago, Illinois: National Council of Juvenile Court Judges, undated), p. 86c.

Jury Trials

The need, in both a constitutional and functional sense, for a jury to decide the "guilt" or "innocence" of the accused delinquent is a most complex matter, at least as measured by the response the issue evokes. Most commentators seem to agree upon the general inutility of juries in juvenile courts.[1] Perhaps the most commonly used rationale supporting this position is that the use of a jury in no way helps the court discover the proper treatment methods needed and that the jury process is an unnecessary formalization of procedure at best, and a harmful infringement upon the judge's discretion at worst. This argument rests on the implicit assumption that, unlike criminal trials, there is no issue of "guilt" or "innocence" to be decided, to which a jury would direct its attention, or that such considerations are of secondary importance when compared with the primary purpose of "helping the youth in trouble." The President's Commission on Law Enforcement, for example, has indicated its general opposition to the use

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[1]See the following: Lou, Juvenile Courts, pp. 136-137; Negley K. Teeters and John O. Reinemann, The Challenge of Delinquency (New York, New York: Prentice-Hall, 1950), p. 236; William M. Trumbull, "Proposed New Juvenile Court Act for Illinois," Illinois Bar Journal, LIII (March, 1965), 617; Thomas A. Welch, "Delinquency Proceedings - Fundamental Fairness for the Accused in a Quasi-Criminal Forum," Minnesota Law Review, L (March, 1966), 690-692; Cal. Gov. Comm. Report Pt. II, p. 19; Standards, p. 73; and S.J.C.A., p. 47.

of juries in juvenile matters by saying that a fair system of justice does not require jury trials and in juvenile matters no real benefit accrues from their use.[1]

Functional arguments and expert opinion aside, what have been and what are the constitutional, both state and federal, requirements on the issue? State appellate courts have generally held that their own constitutional guarantees of jury trial are not applicable to juvenile courts.[2] The Illinois juvenile court statute did for many years contain a jury trial provision under which any interested party could demand a jury of six or the judge on his own motion could require such jury.[3] The provision was undoubtedly included to meet any challenge arising from the Illinois constitutional requirement pertaining to the right of trial by jury.[4] The provision seems to have been seldom invoked during the many years it was in effect,[5] but in 1913 it was

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[1] Task Force Report, p. 38.

[2] For a lengthy summary of the cases on this point, see Am. Jur.2d, "Juvenile Courts," sec. 47

[3] Ill. Rev. Stat. (1965), c. 23, sec. 2002

[4] Illinois, Constitution (1870), art. III, sec. 5.

[5] Fred G. Suria, Jr. and Cherif M. Bassiouni, "The Illinois Juvenile Court Act -- A Current Perspective," Illinois Continuing Legal Education, V (April, 1967), 121, and David R. Barrett, William J. T. Brown, and John M. Cramer, "Notes - Juvenile Delinquents: The Police, State Courts, and Individualized Justice," Harvard Law Review, LXXIX (February, 1966), 793.

tested in the Illinois Supreme Court.[1] The major problem turned on the point that the law permitted only a jury of six while the common law required a jury of twelve. The court said that the Illinois constitutional provision that the right to jury "shall remain inviolate," did not apply in this instance because the proceeding was statutory and not a proceeding according to the course of the common law. The legislature was thus free to limit the number of jurors, and the court clearly implied that it would have looked with favor upon the statute even absent any jury provision. The authors of the 1965 statute revision apparently reached the same conclusion about the effect of the state high court decision and excluded any reference to jury trials in the present law.

New York and California also now omit from their juvenile justice system any right of a jury trial. There is no mention of a jury in the California statute, and the New York law uses the term "jury" twice only, in each instance, to deny the right to the proceedings in question.[2]

With regard to the federal Constitution and adult criminal prosecutions in the various states, interpretation of the Sixth Amendment has undergone considerable change. Justice Cardozo in 1937 expounded upon the application of the

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[1] Lindsay v. Lindsay, 275 Ill. 328, 100 N.E. 892 (1913).

[2] N.Y. Family Court Act, sec. 435 and sec. 531 (McKinney 1963).

Bill of Rights as limits upon state action and found that only those individual protections which are the essence of "ordered liberty" may correctly be included within the due process clause of the Fourteenth Amendment and thus limit state authority.[1] On the specific issue of a right to jury trials in state criminal prosecutions, he said:

> The right to trial by jury and the immunity from prosecution except as the result from an indictment may have value and importance. . . . /but to/ abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[2]

Obviously if jury trials were not constitutionally mandatory in adult criminal prosecutions, they were not required in juvenile cases.

Justice Cardozo's reasoning was rejected in 1968 in the case of Duncan v. Louisiana in which Justice White said:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right to jury trial in all criminal cases which -- were they to be tried in federal court -- would come under the Sixth Amendment's guarantee.[3]

It is particularly relevant to note that in this view states must afford a jury trial in criminal cases where it would be allowed in federal courts. In the light of a recent federal district court decision declaring a "no-jury" provision of

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[1] Palko v. Connecticut, 302 U.S. 319 (1937).

[2] Ibid., p. 325.

[3] 391 U.S. 145, 149 (1968).

the federal juvenile delinquency statute unconstitutional, the quoted comment may well portend problems for those states continuing to deny a right to jury trials in their juvenile courts.[1]

From the Gault decision alone, the "no-jury" rule could not be directly challenged, but the combined rationale of the Duncan case with that of Gault has already given the issue a new prominence. In DeBacker v. Brainard,[2] where four of the seven Nebraska Supreme Court justices believed the state's statute denying a jury trial in delinquency cases was unconstitutional, the court, nevertheless, was unable to so rule because of a provision in the Nebraska constitution that five justices must concur before a state statute may be declared unconstitutional.[3] The majority said:

> Four judges, a majority of this court, are of the opinion that a juvenile charged with violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile court if the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court.[4]

The minority, whose opinion carried the day, said that Gault

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[1] Nieves v. U.S., 280 F. Supp. 994 (S.D.N.Y. 1968).

[2] 183 Neb. 461, 161 N.W.2d 508 (1968).

[3] Nebraska, Constitution (1875), art. V, sec. 2.

[4] DeBacker v. Brainard, 183 Neb. 461, 466, 161 N.W.2d 508 (1968).

did not even infer that a jury trial was required and they distinguished Duncan on grounds that it was a criminal case.

On appeal to the national Supreme Court, the case was decided in a per curiam decision that did not touch upon the substantive issues involved.[1] The court held that since Duncan had prospective application only, appellant could not claim the right to a jury trial because his juvenile court hearing took place before Duncan was decided. Dissents by Justices Black and Douglas that accompanied the per curiam decision suggest the existence of sentiment on the high court for an early decision on the merits that would be hostile to the "no-jury" policy.

In sum, it may be concluded that constitutional requirements concerning jury trials in delinquency proceedings in state courts are in a state of flux. Since, as stated in Duncan, states must now afford the right to a jury trial in criminal prosecutions, and since, as stated in Nieves, federal juvenile delinquency proceedings are criminal with respect to the jury trial right, and since, as stated in Gault, state delinquency proceedings may, for specified purposes, be considered criminal, for all of these reasons one may accurately conclude that future Supreme Court action may very well apply the Duncan decision to state juvenile delinquency proceedings. The applicability of Duncan to such

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[1] DeBacker v. Brainard, 396 U.S. 28 (1969).

proceedings has received a mixed reception in state appellate courts and resolution of these and possibly other conflicting opinions will have to come via a federal Supreme Court decision.[1]

Evidence Requirements

Whether a jury or a judge decides the issues in a delinquency trial, there must be some standards by which the admissibility of evidence is ruled upon. Once the evidence has been heard there must, in addition, be some standard on which a decision will be made. The first problem area may, for convenience, be labeled "admissibility of evidence," and the latter be called "degree of proof."

The use of what has commonly been called "hearsay" in juvenile courts has long been examined, discussed, and debated among scholars in the field.[2] Such evidence may enter a juvenile proceeding either through testimony, sworn or unsworn, given by persons appearing before the court, or as part of a social report by a probation officer. Dean

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[1]For examples of state appellate court rejection of argument supporting jury trial requirement in delinquency proceedings, see Dryden v. Kentucky, 435 S.W.2d 457 (Ky. 1968), and In re State in the Interest of J.W., 106 N.J. Super. 129, 254 A.2d 334 (1969). Contra., Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

[2]For an extensive review of this subject, see the following: Wigmore, Evidence, sec. 1400; John J. Cannon, "The Hearsay Rule," Juvenile Court Judges Journal, XVII (Spring, 1966), 25-32; and "Employment of Social Investigation Reports," pp. 702-727.

Wigmore has commented as follows on the general evidentiary rules utilized in juvenile courts:

> The procedure devised for juvenile courts is apt and enlightened. Nevertheless, the promoters of that legislation in their enthusiasm, for its benefits and their determination to eliminate the conditions of the usual criminal court, have gone to the borderline of prudence in their iconoclasm. In the most advanced type of statute, the orthodox rules of evidence have been riddled as with a reformative machine-gun. . . . The hearsay reports of probation officers and others [for example] can be used without calling them to be examined.[1]

Dean Wigmore's comment may be viewed as correctly summarizing the situation at least before 1967, although the weight that could be given hearsay evidence was qualified in some situations and in some states.[2]

The Gault decision would appear to render invalid any commitment resting upon hearsay evidence to whose admission there has been a seasonable objection. Such evidence is not sworn testimony by a witness who can be confronted and be meaningfully cross-examined -- procedural items on which the opinion by Justice Fortas is most insistent. He wrote:

> . . . [A]bsent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing

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[1] Wigmore, Evidence, sec. 1400.

[2] See In re Ross, 45 Wash.2d 654, 277 P.2d 335 (1954). For further comment, see Don O'Shea, "Evidence -- Juvenile Courts -- Proceedings Held to be Civil in Nature and Hearsay Inadmissible," Notre Dame Lawyer, XXXIX (April, 1964), 343.

Gerald to a state institution for a maximum of six years.[1]

Because hearsay testimony includes that which is not subject to cross-examination it would seem to be excluded the Gault decision.

It is useful to reiterate the limits of this ruling. Only delinquency proceedings involving possible commitment were included within the purview of Justice Fortas' comments. There is also no reason why hearsay testimony might not be permissible if the respondent agreed in advance to its admission. This latter event, however, would seem unlikely in most instances because if the charges were denied the respondent would be most unlikely to permit damaging testimony to be given without utilizing his right of cross-examination,[2] and if the juvenile admitted his "guilt" through a valid confession, such testimony would be reserved for the disposition hearing.

Each of the states considered in some detail previously seems to have met the requirements of Gault in so far as the admissibility of evidence is concerned, with the

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[1] In re Gault, 387 U.S. 1, 56 (1967).

[2] This is assuming the presence of counsel to act as legal adviser for the juvenile in the delinquency proceeding. The rate of appearance of counsel in contested delinquency cases would seem higher than where the allegations are admitted. For a general discussion of the types of cases in which attorney representation is most frequent, see Daniel L. Skoler and Charles W. Tenney, Jr., "Attorney Representation in Juvenile Court," Journal of Family Law, IV (Spring, 1964), 82.

conformity pre-dating Gault in at least some instances. Illinois specifically requires the application of the rules of evidence proper for civil proceedings in all juvenile court cases with the additional specification that in delinquency matters the even tighter criminal evidentiary rules must be followed.[1] New York, using language similar to that of the Children's Bureau recommendations,[2] makes mandatory the utilization of only "competent, material, and relevant" evidence at the fact-finding hearing.[3] The California statute might appear to be somewhat less stringent in its evidentiary requirements, permitting the use of any information that is "relevant and material."[4] The California courts have, however, interpreted that state's juvenile court statute as requiring reversal of delinquency adjudications in which hearsay and prejudicial material, in the form of a social report, was before the court during the trial or fact-finding hearing.[5]

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 704-6. In 1960 an Illinois appellate court reversed a dependency adjudication on the grounds that the juvenile court had made use of confidential reports gathered by public welfare officers who were not available for cross-examination. In re Rosmis, 26 Ill. App.2d 226, 167 N.E.2d 826 (1960).

[2] Standards, p. 73.

[3] N.Y. Family Court Act, sec. 744 (McKinney 1969-70 Supp.).

[4] Cal. Wel. and Inst. Code, sec. 701 (West 1966).

[5] In re Corey, 266 Cal. App.2d 295, 72 Cal. Rptr. 115 (1968).

Whether to apply the quantum of proof required in civil or criminal proceedings constitutes the second dimension of the evidentiary issue.[1] The problem may be viewed as a question of whether juvenile courts should apply the "preponderance of evidence" test commonly used in civil proceedings or the more rigorous "proof beyond a reasonable doubt" test used in criminal courts, particularly in delinquency proceedings where commitment is a dispositional possibility.

Traditionally, of course, juvenile courts have made use of the preponderance test, avoiding whenever possible procedures smacking of criminality.[2] The reasonable doubt test injects the greater burden upon the state that is typical of criminal procedure. In an effort to find a middle ground between the two tests there was a suggestion some years ago by the Advisory Council of Judges of the National Council on Crime and Delinquency that the test of "clear

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[1]That the opinions of recognized authorities are in a state of flux on this issue may be seen in the fact that the Children's Bureau accepted in 1966 the preponderance test but in 1969 recommended proof beyond a reasonable doubt to establish delinquency. See Standards, p. 72, and U.S., Children's Bureau, Legislative Guide, p. 33. The Standard Juvenile Court Act is silent on the subject relying upon appellate courts to make a determination. Such questions are now academic due to recent Supreme Court action.

[2]For a timely and comprehensive review of the whole issue of preponderance and reasonable doubt standards in juvenile courts, see James H. Cohen, "The Standard of Proof in Juvenile Proceedings; Gault Beyond a Reasonable Doubt," Michigan Law Review, LXVIII (January, 1970), 567-602.

and convincing" proof be used.[1] This test, it was argued, would recognize the importance of a juvenile court adjudication and still avoid applying the rigid rules of criminal procedure. The proposal received but scant acceptance in appellate courts.[2]

The Illinois Supreme Court, anticipatory of federal Supreme Court action, in 1968 overturned previously accepted arguments[3] and ruled the preponderance test constitutionally invalid in delinquency trials.[4] Those sections of the Illinois law relating to the preponderance standard for delinquency trials[5] were declared unconstitutional as a denial of due process and equal protection of the laws, and the reasonable doubt standard was ruled mandatory.

By injecting the element of equal protection of the laws under the Fourteenth Amendment the door to complete application of all criminal protections may have been opened

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[1] Procedure and Evidence, p. 68.

[2] One instance where an appellate court indicated its agreement with the test was in Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965), rev. 387 U.S. 1 (1967), on other grounds.

[3] See In the Matter of Teague, 77 Ill. App.2d 55, 221 N.E.2d 790 (1966).

[4] In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1968). For comment on this case, see Richard A. Michael and William C. Cunningham, "From Gault to Urbasek: For the Young, the Best of Both Worlds," Chicago Bar Record, XLIX (January, 1968), 162-168.

[5] Ill. Rev. Stat. (1965), c. 37, sec. 701-4 and sec. 704-6.

by the Illinois high court. Whereas the due process requirement may be viewed as somewhat flexible in that what is due process for an adult may vary somewhat from that which is due process for a juvenile, this flexibility would perhaps not be present if juvenile courts are constitutionally obliged to provide equal protection of the laws. The latter concept can easily mean "the same protection," thus bringing to juvenile courts the full range of constitutional protections available in criminal courts, assuming that the court is saying that delinquency cannot reasonably be treated as a category distinct from criminality.

The Illinois rejection of the preponderance standard did not prompt either the New York or California courts to do the same.[1] In a lengthy opinion providing a detailed rationale supporting its decision, the California Supreme Court in 1969 upheld that state's preponderance standard[2] against an attack that Gault by implication required the reasonable doubt test.[3] The New York courts were similarly

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[1]Illinois was not the first state to judicially require the reasonable doubt test. Virginia's Supreme Court in 1946 held the more stringent standard applicable because of the stigmatizing effect juvenile court adjudication had upon the juvenile. Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946). The reasonable doubt requirement was made obligatory in federal juvenile delinquency proceedings in U.S. v. Costanzo, 395 F.2d 441 (4th Cir. 1968).

[2]Cal. Wel. and Inst. Code, sec. 701 (West 1966).

[3]In re M., 70 Cal.2d 444, 450 P.2d 296 (1969).

not persuaded by the Illinois reasoning and continued to accept the statutory preponderance standard of their state as valid.[1]

The national Supreme Court settled the matter in 1970 in In the Matter of Winship.[2] Justice Brennan, writing for the court held the due process clause of the Fourteenth Amendment to require proof beyond a reasonable doubt in the adjudicatory phases of delinquency trials.[3] After discussing the several cases preceeding the one at hand, Justice Brennan wrote:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[4]

The majority opinion relied upon the rationale expressed in Gault that where the juvenile is subject to loss of liberty for a period of years, the proper comparison is with a felony prosecution. Just as in Gault, the majority opinion explicitly restricted the focus of the decision to the

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[1] In the Matter of W., 24 N.Y.2d 196, 247 N.E.2d 253 (1969), rev., 397 U.S. 358 (1970).

[2] 397 U.S. 358 (1970). It should be remembered that Chief Justice Warren had retired and Justice Fortas had resigned from the court in the interim period between Gault and Winship.

[3] This standard was also made applicable to all criminal prosecutions.

[4] In the Matter of Winship, 397 U.S. 358, 364 (1970).

adjudicatory portion of the juvenile court process in the determination of delinquency.

Justice Brennan's opinion was constitutionally based upon the due process clause of the Fourteenth Amendment and no view was given as to whether the relevant section of the New York statute[1] also violated the equal protection clause of that same amendment to the federal Constitution. For the majority, the fatal error in a delinquency adjudication based on a preponderance of the evidence was in its denial of what might be labeled "fundamental fairness" to the juvenile so adjudged.

Justice Brennan thought of the holding as not hostile to other aspects of juvenile court functioning and felt that the preponderance test must be abandoned as susceptible of misinterpretation in that it calls for a balancing of facts which may result in a weighing of the quantity of evidence produced by either side rather than an analysis of the truth of the allegations.

A separate opinion concurring with the majority decision was filed by Justice Harlan. Explicitly basing his reasoning on the "fundamental fairness" doctrine[2] his main complaint against the preponderance test was that it requires less certainty as to the facts than does the

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[1]N.Y. Family Court Act, sec. 744(b) (McKinney 1969-70 Supp.).

[2]See Palko v. Connecticut, 302 U.S. 319, 325 (1937).

reasonable doubt standard, and thus makes it easier to convict. Our society, he thought, has accepted the value that it is not as undesirable for a payment of damages, as in a civil suit, to be mistakenly decided as it is undesirable for an innocent man to be convicted of a crime. As he put it:

> In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.[1]

He further concluded that the consequences of mistaken factual determination in delinquency trials were not sufficiently different from those in a criminal case to permit abandonment of the reasonable doubt standard.

In a brief three paragraph dissent, Chief Justice Burger, speaking for himself and Justice Stewart, explained their reasons for opposing this decision. He wrote that the majority decision rested on assumptions, to him unacceptable, that all juvenile proceedings are criminal prosecutions, adding:

> Since I see no constitutional requirement of due process sufficient to overcome the legislative judgment of the States in this area, I dissent from further strait-jacketing of an already overly-restricted system. What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in

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[1] In the Matter of Winship, 397 U.S. 358, 372 (1970).

> order to survive, if it can survive the repeated assaults from this court.[1]

This dissent, absent any citations or references to other specific cases, concluded with an expression of concern lest legislatures respond to the majority holding by abolishing the juvenile courts.

Not unexpectedly Justice Black also dissented from the majority decision. It will be recalled that his concurrence in Gault was based on the belief that the Bill of Rights was made directly applicable to states via the Fourteenth Amendment and not because fundamental fairness was denied. Because the federal Constitution makes no specific reference to a quantum of proof required, Justice Black thought the Supreme Court had no authority to impose its conception of the proper standard upon what is a legislative prerogative.

The effect of the Winship decision on the various state statutes will, of course, depend upon their procedures at the time of the decision. The Illinois statute will be unaffected not only because of the earlier state Supreme Court action, but also because of a 1969 change in the juvenile court statute which wrote that decision into the law in the form of a specification that the reasonable doubt test is mandatory for any adjudication of delinquency.[2] A

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[1] Ibid., p. 376.

[2] Ill. Rev. Stat. (1969), c. 37, sec. 701-4 and sec. 704-6.

majority of the states were, however, following the contrary rule and these have become constitutionally obliged to alter their standards of proof in delinquency trials.[1]

As an interesting sidelight, it may be noted that some states lack, or until recently lacked, any statutory delineation of a preference between the preponderance and reasonable doubt rules. As a result there may have existed states at the time of the Winship decision in which, as was true in California in an earlier period,[2] some juvenile court judges followed one rule and some the other. In any such states, the Winship decision will have what would appear to be the obviously desirable result of setting a uniform pattern.

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[1] In the Matter of Winship, 397 U.S. 358, 360, note #3 (1970).

[2] Cal Gov. Comm. Report Pt. II, pp. 9-10.

CHAPTER VII

POST-TRIAL PROCEDURES

Aside from petition dismissal, which is essentially a finding of absence of guilt in a delinquency trial, all juvenile court adjudications involve some subsequent judicial activity, and may very possibly require administrative action as well. How the court will dispose of the case depends upon a myriad of factors not the least important of which are statutory limitations, availability of referral or social welfare agencies, personal characteristics of the juvenile before the court, and in general the various alternatives open to the court.

Disposition Hearing Generally

The final phase of juvenile court activity begins at the end of the fact-finding hearing or trial. The ensuing proceedings, similar to the sentencing steps in the criminal courts, are perhaps most commonly described as juvenile court disposition. For juveniles not discharged at the end of the trial the court proceeds to develop and place into effect a suitable treatment program. Theoretically, the bifurcated hearings permit the court to separate the fact-finding process from the dispositional steps and thus permit utilization of information that would be

inadmissible in the trial itself, usually in the form of social reports. The need for separating the two functionally discreet court operations has become increasingly clear as the requirements of due process have been more specifically imposed on juvenile courts. Particularly for cases in which the charges are denied, fair treatment requires avoidance of adjudications based on information not properly admissible in the trial. This is facilitated by the two-stage juvenile court procedure, which some jurisdictions have formally adopted. The Supreme Court of the United States has tacitly recognized this separation of function by restricting its review of juvenile court proceedings to the adjudicatory process. Future decisions may, however, be more broadly applicable.

Although the right to counsel in juvenile courts has been emphasized most commonly in the adjudicatory stages of the administration of juvenile justice, the availability of legal advice at the dispositional portion of the process may be of even more crucial importance to the respondent. As one writer pointed out:

> Since the majority of juvenile delinquency hearings involve pleas of guilty, it is clear that for most adjudicated delinquents, the disposition decision may be the most critical stage of all and thus the one most urgently requiring an advocate for the child.[1]

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[1]Daniel L. Skoler, "The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings," Indiana Law Journal, XLIII (Spring, 1968), 569.

The role to be played by counsel at this step has been described as follows:

> The attorney should play a vigorous part in these proceedings as well /as in the adjudicatory stages/. He should request the court to allow him to examine all reports. Even though this is within the discretion of the court, most judges will allow the attorney to review phychiatric, and probation files. It is at this point that the knowledge of the child's family background and social history obtained at the initial interview becomes invaluable. The lawyer can make intelligent suggestions and offer alternative plans to commitment.[1]

Another writer has pointed out that the judge may be more amenable to alternatives to commitment if they are suggested by an attorney.[2]

The controversy surrounding the use of a social report in the dispositional phase of juvenile court operations centers around whether the juvenile and his attorney should have access to the report and the sources from which the report was drawn. There seems little doubt that courts, criminal or juvenile, may, after conviction, use evidence additional to that given to establish guilt in order to determine what sentence or disposition is appropriate. As the federal Supreme Court has commented:

> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to the evidence that is strictly relevant to the

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[1]Marshall J. Hartman, "Trying a Delinquency Case in Juvenile Court," Illinois Bar Journal, LV (December, 1966), 298.

[2]Anton R. Valukas, "The Juvenile Court in Operation -- Substantial Improvements Needed," Chicago Bar Record, L (April, 1969), 357.

> particular offense charged. . . . A sentencing judge, however, is not confined to the narrow issue of guilt. . . . Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[1]

Essentially the same reasoning would justify the use of social reports to aid the juvenile court judge in reaching a proper disposition for a juvenile adjudged a ward of the court. Accepting the need for such information does not, however, dispose of the problem of disclosure to the respondent. Those who oppose the policy of opening the social report for examination by the juvenile often point to the need for protecting the identity of the sources supplying the information.[2] Opponents of this view argue that hearsay and other unverifiable data have no place even in a very specialized judicial hearing unless the defendant is given an opportunity to challenge its validity.[3]

Under Illinois law the juvenile court may, once the dispositional hearing has commenced, take into account any available evidence helpful in determining the question of

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[1] Williams v. New York, 387 U.S. 241, 246-247 (1949).

[2] "Employment of Social Investigation Reports in Criminal and Juvenile Proceedings," Columbia Law Review, LVIII (May, 1958), 707.

[3] Edward F. Waite, "How Far Can Court Procedure be Socialized Without Impairing Individual Rights?" in The Problem of Delinquency, ed. by Sheldon Glueck (Boston, Massachusetts: Houghton Mifflin Co., 1959), p. 307.

court disposition.[1] This includes oral and written reports. The statute also specifically allows at this stage the application of relaxed evidentiary rules. The statute also declares, however, that the court must inform all parties concerned with the hearing of the factual contents and conclusions of any reports considered by it and afford fair opportunity, if requested, to controvert them. This is hedged by authority in the court to refrain from submitting the actual reports to the parents or guardian of the juvenile and to keep from disclosing the sources of confidential information.

California merely requires that the juvenile court include within the order of disposition the social study on which the court relies to determine the appropriate rehabilitation program.[2] Probation reports may be inspected by the juvenile and his parents only if the court so allows, although one commentator has referred to this review of the probation report as a "right" given to the juvenile and his parents.[3]

New York has given its family courts wide discretion in revealing the content of the social investigations used in the court disposition, but creates no statutory right to

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 705-1.

[2] Cal. Wel. and Inst. Code, sec. 706 (West 1966).

[3] Ralph E. Boches, "Juvenile Justice in California: A Re-Evaluation," Hastings Law Journal, XIX (November, 1967), 95.

examine the probation department's report.[1]

Of these three states, it is the Illinois practice that most clearly accords with the standards of the United States Children's Bureau:

> . . . [F]acts presented -- either orally or written -- upon which the court relies, should be open to rebuttal by the child, his family, or their counsel, and witnesses may be introduced to rebut them. This does not mean that the entire social study (which may contain other facts, confidential in nature and not relevant to disposition), should be available to the child, parent, guardian, or counsel. However, that information in the record referred to by the judge or incorporated in the summary report upon which the court relies in making disposition should be made known to the child, parent, guardian, or counsel.[2]

Probation as Treatment

Probation has, since the inception of juvenile courts been at the very core of the rehabilitative program.[3] Every state has provided for some form of probation program in its administration of juvenile justice.[4] Depending

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[1]N.Y. Family Court Act, sec. 746(b) and sec 835(b) (McKinney 1969-70 Supp.).

[2]Standards, p. 74.

[3]John O. Reinemann, "Probation and the Juvenile Delinquent," The Annals, CCXLI (January, 1949), 109-119.

[4]U.S., President, Task Force Report: Corrections, (The President's Commission on Law Enforcement and the Administration of Justice; Washington, D.C.: Government Printing Office, 1967), p. 134. It was also reported that thirty-one states have probation services for juvenile courts in every county and that 74 per cent of all counties in the United States have some form of probation services.

upon statutory requirements, the court may draw up a probation program describing substantive behavioral requirements and the length of time the juvenile will be subject to probation, or such specifics may be left open with details to be worked out by the probation department.[1] In order to prevent the juvenile court from becoming involved in administrative details and perhaps loose its primary function of dispensing justice[2] the Children's Bureau has recommended that the juvenile court determine the broad outlines of probation with the specifics to be worked out by a probation department operating as a state-wide agency working in conjunction with the administrative office of the courts at the upper echelons of the judicial hierarchy rather than being under the direct control of the local juvenile court.[3]

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[1]See Am. Jur.2d, "Juvenile Courts," sec. 31, and Alfred J. Kahn, A Court for Children (New York, New York: Columbia University Press, 1953), pp. 137-138.

[2]For comments on this primary function of juvenile courts, see Roscoe Pound, "The Juvenile Court and the Law," in Cooperation and Crime Control: 1944 Yearbook of the National Probation Association, ed. by Marjorie Bell (New York, New York: National Probation Association, 1944), pp. 17-18.

[3]Standards, pp. 30-32, 90. One writer has argued that Gault, in requiring due process to be met in juvenile delinquency proceedings, requires the juvenile court judge to be "totally divorced" from the administration of juvenile probation for otherwise he may be the administrative head of the agency responsible for presenting the case against the juvenile. Where the probation department is given such "prosecution" responsibility, this view may be valid. Boches, "Juvenile Justice," p. 67. It may be noted here that Illinois authorizes state's attorneys, not probation officers, to "prosecute" accused delinquents. Ill. Rev. Stat. (1969), c. 37, sec. 701-21.

This contrasts with the presently common attachment of probation staffs to the local courts and the emerging practice of utilizing probation and parole staffs employed by state welfare and correctional agencies.

The Illinois juvenile court statute placed the probation departments directly under the control of the local courts. Under the present law all probation officers are appointed by the circuit court with the chief judge being given responsibility for supervision of the probation departments in his circuit, although he may delegate such responsibility to other judges.[1] In any event, the probation departments are organized on a county basis. Whether there is specialization of function within the probation departments depends on the chief judge. State-wide qualifications may be imposed by the Conference of Chief Circuit Judges.

Among other duties, probation officers assume administrative responsibility for executing the juvenile court's probation program for delinquents. If probation is the treatment program to be utilized by the court, the terms and conditions of such probation must be included in its disposition orders. Illinois practice has been described as follows:

> The order of probation may be until further order of the court, or may be set for a date certain. The court with the assistance of counsel, parents,

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[1] Ill. Rev. Stat. (1969), c. 38, sec. 204-1, and c. 37 sec. 706-1.

> custodians, and guardians, state's attorney, and probation officer, may set the terms and provisions of the probation. If the terms and provisions of probation are complied with, a probation officer may move in due course to have the probation terminated and the minor released as a ward of the court and the case is closed.[1]

Clearly, the Illinois juvenile court, sitting as a branch of the circuit court, is administratively involved in the probation operation. To some degree this circumstance may be attributed to an early Illinois Supreme Court decision rendering a portion of the old juvenile court statute unconstitutional because it violated the principle of separation of powers under the Illinois Constitution by placing a portion of the probation department of the Cook County Circuit Court under the authority of the Cook County Board of Commissioners.[2] Describing the function of the probation officer, the court likened their role to that of masters in chancery and other assistants of the court. It followed that because the administration of probation is a judicial function, control over the agency carrying out this operation must be placed within the courts. As long as probation is thus seen as a judicial function by the Illinois courts, converting probation departments into an administrative machinery separate from the courts is impossible.

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[1]Fred G. Suria, Jr. and M. Cherif Bassiouni, "The Illinois Juvenile Court Act -- A Current Perspective," Illinois Continuing Legal Education, V (April, 1967), 119.

[2]Witter v. Cook County Commissioners, 256 Ill. 616, 100 N.E. 148 (1912).

New York has established its probation system on a plan very similar to that of Illinois. Each county has a probation officer who acts under the direction of the judge of the family court.[1] The court defines the terms of probation, but unlike Illinois New York places limits as to the length of time a juvenile can be under the authority of the probation department.[2] The maximum period of one year on probation is established for persons adjudged only in need of supervision, while those found to be delinquent have a two year limit. This statutory limitation on the probation period runs counter to the juvenile court philosophy of individualized treatment and the use of probation strictly for rehabilitative and not for punitive ends. If probation were exclusively designed for the benefit of the youth, with no punishment attaching to its use, no valid reason could support limiting the juvenile court's discretion in setting the length of probation, assuming the court had the resources and intention to act in the juvenile's behalf.[3]

California also has placed its probation department under the authority of the juvenile court but has created

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[1]N.Y. Family Court Act, Rule 2.3, 2.4 (McKinney 1963).

[2]Ibid., sec. 757 (1969-70 Supp.).

[3]Even in Illinois, however, there is an arbitrary age limit beyond which juvenile court jurisdiction ceases. At age twenty-one all probation must cease and the juvenile is released from any responsibility to the court. Ill. Rev. Stat. (1969), c. 37, sec. 705-11(1).

an appointment system in which the juvenile court judge selects probation officers from the nominations of a commission on juvenile justice established in the various counties.[1] Subsequent to an adjudication of wardship, the court may place the juvenile on probation under the sections of the juvenile court act that would elsewhere be classified as delinquency, or is otherwise a minor in need of supervision. As in Illinois no specific limits are placed upon the length of time the juvenile may be kept on probation. Unlike Illinois, there seems to be no statutory requirement concerning the inclusion within the court order of the manner in which the probation will be carried out. There may be in California a somewhat greater autonomy of operation in the probation department than in Illinois. This, at least, is suggested by a finding and recommendation of the California Governor's Study Commission:

> The Commission observes that juvenile court judges play varying roles in the administration of probation departments. A small number of judges are intimately involved in the details of administration. The majority, however, have delegated administrative responsibilities to their chief probation officers, . . .
>
> The Commission believes that the juvenile court judge's role in the treatment process should be limited to establishing judicial checks on an administrative function.[2]

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[1]Cal. Wel. and Inst. Code, sec. 575 (West 1966).

[2]Cal. Gov. Comm. Report Pt. I, p. 39.

Although several reasons were given by the commission for advancing this suggestion, perhaps the most basic ground was concern for the maintenance of the judicial function of juvenile courts rather than to permit their becoming embroiled in primarily administrative duties.

The use of a continuance has been mentioned previously as a device for achieving probation without first declaring the juvenile to be a delinquent or otherwise in need of supervision. Illinois and California have each included in their juvenile court statutes provision for a continuance in this pattern. In Illinois the court may, absent objection from respondent, continue the adjudicatory hearing from time to time allowing the minor to remain in his home subject to such conditions as the court may prescribe.[1] The California statute is somewhat different in that it seems to require first a finding by the court that the juvenile is a person within the relevant sections of the juvenile court statute before a continuance is ordered.[2] There is also in California a time limit of six months during which a juvenile may be placed on probation absent an official court adjudication. The New York formal version of a continuance

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 704-7(1).

[2] Cal. Wel. and Inst. Code, sec. 725(a) (West 1966). The California statute does not refer to the proceeding as a continuance per se but merely empowers the court to place the juvenile on probation without an official adjudication being reached.

requires the family court to conclude first that the juvenile is a delinquent or person in need of supervision and then, at the court's discretion, to suspend judgment and to define the terms of the suspension for a period of not more than two years.[1]

The Illinois method of continuing the case while requiring the juvenile to conform to certain behavior restrictions has been criticized because the continuance may be based on either of two quite different causes. As one writer commented:

> It is unclear whether the Illinois legislature contemplated merely the withholding of findings after the hearing has been concluded, or an actual interruption of the hearing before factual determinations are made. While the former construction would appear to be correct, the existence of some doubt on the question has had a crippling effect on the continuance procedure in that state. Since the continuance may have been granted by a judge who held the second view of the statute, the grant of a continuance does not necessarily imply -- as it does under the first view -- an adjudication that the youth in fact committed the act.[2]

The same source supplying the above quotation has reported that juvenile court judge Walter Dahl traces the reluctance of Illinois juvenile court judges to use the continuance to the fact that they fear that in subsequent legal proceedings involving the youth, the court will not know whether the continuance had been ordered to allow the gathering of more

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[1] N.Y. Family Court Act, sec. 753 (McKinney 1963).

[2] "Rights and Rehabilitation in the Juvenile Courts," Columbia Law Review, LXVII (February, 1967), 293.

evidence or for social reasons. While the continuance based on a full consideration of all facts without reaching an official adjudication of delinquency or MINS may be a very laudatory procedure designed to protect the juvenile, its utilization without an official determination of the facts seems unwarranted.

Procedures utilized in revoking official probation vary considerably, but quite commonly there is a new hearing based on the alleged violation of probation, which may itself constitute the basis for a delinquency petition. It is in this fashion that a youth adjudged to be a minor in need of supervision and placed on probation for non-criminal acts, may later be adjudged delinquent on the basis of a probation violation and be committed to an institution reserved for juvenile law violators.[1] Where this procedure for probation revocation is used, the full impact of Gault would apply because the new proceeding would be a delinquency trial in the fullest sense of the term. Some states, such as New York,[2] provide for special revocation proceedings rather than requiring a separate delinquency petition. Regardless of the procedure adopted, where commitment is a possibility, Gault will have application.

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[1]Illinois has such a procedure. Ill. Rev. Stat. (1969), c. 37, sec. 702-2.

[2]N.Y. Family Court Act, sec. 779 (McKinney 1963).

Commitment as Treatment

Proponents of the juvenile court system have long maintained that commitment to an institution is ideally only a last drastic resort among available treatment programs. Probation and/or release to parental or other adult supervision deserves consideration in their view before confinement in any type of institution is ordered. The legislatures of the three states examined here have recognized the inevitable stigma attaching to institutional commitment by largely limiting its use to those convicted of law violations.[1] It must be remembered, however, that violation of a court order of probation, even one based on relatively inoffensive acts, may also lead to institutional commitment.

The juvenile court in Illinois plays a less direct role in the events after commitment to a state agency is effected than is the case where some other disposition is made. The following quotation is still accurate, if Juvenile Division of the Department of Corrections is substituted for Youth Commission, in so far as it describes the relationship of the correctional services to the juvenile courts:

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 705-2(1)(a) and sec. 705-7(d). N.Y. Family Court Act, sec. 754 and sec. 758 (McKinney 1969-70 Supp.). Cal. Wel. and Inst. Code, sec. 730 and sec. 731 (West 1970 Supp.).

> The court does not set the length of stay at the Illinois Youth Commission. The Youth Commission itself is the sole determining body as to the length of rehabilitative process. In fact, the child may be released directly from the Diagnostic Center back to the physical custody of the parents or guardian. This release may take the form of a final discharge in which the custody is terminated or the child may be placed on probation for such period of time as the Youth Commission directs.[1]

It should be remembered, however, that custody of delinquents in Illinois must cease at age twenty-one.

Commitments from the juvenile courts in Illinois first involve an appearance at the diagnostic center operated by the Juvenile Division of the Department of Corrections which then conducts a series of tests on the juvenile to determine which program will be most effective for his rehabilitation and education.[2] When a male youth is determined to be in need of close supervision he is sent to the Illinois Industrial School for Boys at Sheridan, while those who are diagnosed as less dangerous to themselves and the public may be sent to the Illinois State Training School at St. Charles, and boys in need of only minimum supervision may be sent to a forrestry school camp for school age boys or to a forrestry work camp for boys above school age. Girls are received at a separate diagnostic center and may then be

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[1]Suria and Bassiouni, "The Illinois Juvenile Court Act," p. 120.

[2]Illinois, Illinois Youth Commission, Illinois Youth Commission: Origins, Structure, and Objectives (Springfield, Illinois: Illinois Youth Commission, undated), p. 3.

sent to the Illinois State Training Schools for Girls at Geneva. Other treatment programs are also available but these are generally restricted for special needs such as health or mental problems.[1]

Under New York law, commitments of delinquents may not exceed three years. The statute explicitly forbids the extension of the court's jurisdiction to persons twenty-one years of age or older.[2] Unlike New York, the California statute limits the length of commitment only by prohibiting the retention of custody past age twenty-one.[3]

Serious difficulties may arise when persons found delinquent are sent to prisons without having in the interim period been convicted of criminal activity. Such confinement of juveniles, initially or by way of transfer, is not authorized in Illinois, California, or New York but the President's Commission on Law Enforcement has reported that there are ten states in which juveniles can be sent by juvenile courts directly to adult penal institutions, and in another third of the states they can be administratively transferred to adult prisons.[4] This practice has been

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[1]For a general discussion of variations in treatment programs, see Howard E. Fradkin, "Disposition Dilemmas of American Juvenile Courts," in Justice for the Child, ed. by Margaret K. Rosenheim (New York, New York: The Free Press of Glenco, 1962), pp. 126-127.

[2]N.Y. Family Court Act, sec. 756(c) and sec. 758(c) (McKinney 1963).

[3]Cal. Wel. and Inst. Code, sec. 602 (West 1966).

[4]Task Force Report, p. 6.

condemned both from a legal and social standpoint. As one writer said:

> Not only does it deny the transferred youngster, who thus becomes a "prisoner," the protection of criminal proceedings, including a jury trial, but it also undermines the philosophy of the whole juvenile court movement, which was established primarily to protect the child from contacts with adult criminals and from being stigmatized as a convict.[1]

Where the juvenile had been denied any of the rights afforded accused criminals, his transfer to a penal institution designed primarily for convicted criminals would seem unjustified in light of the promise implicit in juvenile court philosophy that in return for his procedural rights the court will avoid imposing punishment.

There has been mixed appellate reaction to confinement of delinquents in the adult prison system. The Rhode Island Supreme Court has taken a permissive slant in the transfer situation approving administrative removal of a delinquent from a state "school" to a prison because of his recalicitrant behavior.[2] Representative of the contrary position is the Vermont Supreme Court, which forcefully argued against administrative transfers saying the procedure rendered the entire claim of parens patriae a "hypocritical mockery."[3] At the federal level, such transfer has been

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[1]William H. Sheridan, "Gaps in State Programs for Juvenile Offenders," Children, IX (November-December, 1962), 213.

[2]Long v. Warden, 93 R.I. 23, 170 A.2d 618 (1961).

[3]In re Rich, 125 Vt. 373, 216 A.2d 266 (1966).

held improper under the relevant District of Columbia statute.[1] The more broadly applicable federal juvenile delinquency law has been held by a United States district court in Pennsylvania to allow such transfer power to the Attorney General.[2]

Both the Standard Juvenile Court Act[3] and the Children's Bureau[4] advise against administrative transfers of delinquents to adult penal institutions. Where the committed juvenile conducts himself in a manner harmful to the institution and those around him by engaging in unlawful activities, subsequent criminal court action is recommended for achieving transfer to penitentiaries.

Illinois statutes do not expressly prohibit administrative transfers of juveniles committed under the juvenile court law but this may be prohibited by implication from other provisions. When a juvenile is committed to the Department of Corrections, the Assistant Director of the Juvenile Division becomes his legal guardian.[5] As manager of the various rehabilitation centers in Illinois, the

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[1] White v. Reid, 126 F. Supp. 867 (D.C.D.C. 1954). Contra, Clay v. Reid, 173 F. Supp. 667 (D.C.D.C. 1959), aff. 272 F.2d 527 (D.C. Cir. 1959).

[2] Suarez v. Wilkinson, 133 F. Supp. 38 (M.D. Pa. 1955)

[3] S.J.C.A., pp. 56-58.

[4] Standards, p. 35.

[5] Ill. Rev. Stat. (1969), c. 37, sec. 705-11(2), and c. 23, sec. 2527.

Assistant Director's authority to administer the treatment program to delinquents is limited to non-penal institutions. Since this is the only agency in the Department of Corrections designated by law to receive delinquents, there would seem to be no statutory authority for transfers to penal institutions. There is, however, no reason why a juvenile who commits criminal acts while in the custody of the Department of Corrections, Juvenile Division, could not be criminally prosecuted and then, upon conviction, be sentenced to a term of imprisonment for those acts. The situation in California and New York is not substantially different.

Even when the juvenile is in an institution for delinquents only, he may raise the issue of involuntary servitude with respect to his work obligations.[1] No instances have been found in which such a claim was upheld. However, the insistence that delinquency proceedings are non-criminal obviously highlights the issue because the federal Constitution prohibits involuntary servitude except as punishment for criminal behavior. Where the issue has been directly confronted, appellate courts have ruled against the claim, using a variety of rationale. The Mississippi Supreme Court, for example, relied upon the common law tradition of apprenticing children out to support industrial

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[1]See Chester J. Aniteau, "Constitutional Rights in Juvenile Courts," Cornell Law Quarterly, XLVI (Spring, 1961), 413.

school commitment.[1] The New Mexico high court has, instead, pointed to the special status of children under the law and their need for restraints and discipline.[2]

Still other minor problem areas that have confronted juvenile court dispositions are the questions of cruel and unusual punishments and restitution for damages done by a juvenile. The United States Supreme Court has indicated that the Eighth Amendment's prohibition against cruel and unusual punishments is applicable against the states via the Fourteenth Amendment,[3] but no case has been found in which an order of a juvenile court was invalidated as contravening this rule.[4] Against such challenges, various state courts have upheld juvenile court orders requiring the juvenile to write an essay on the life of Andrew Jackson,[5] prohibiting parents from having any direct relationship with their children,[6] and transfers from juvenile homes to workhouses.[7] Because of the relative wide range of dis-

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[1] Bryant v. Brown, 151 Miss. 398, 118 S. 184 (1928).

[2] In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

[3] Robinson v. California, 370 U.S. 660 (1962).

[4] For discussion, see Am. Jur.2d, "Criminal Law," sec. 611, and Peter R. Sherman, ". . . Nor Cruel and Unusual Punishments," Crime and Delinquency, XIV (January, 1968), 73-84.

[5] People v. Sly, 180 N.Y. Misc. 96, 39 N.Y.S.2d 474 (1942).

[6] Ex parte Walters, 92 Okla. Crim. 1, 221 P.2d 659 (1950).

[7] In re Robertson, 44 Del. 28, 54 A.2d 848 (1947).

positions available to juvenile courts, when compared with adult criminal courts, challenges under the Eighth Amendment's prohibition against cruel and unusual punishments may receive appellate attention at some future date, particularly when juvenile court judges choose to adopt bizzare treatment methods to stress upon the youth the gravity of his actions.[1]

Restitution in the form of payments for damage done by juveniles is sometimes a more or less express condition for lenient treatment by the juvenile court. This is difficult to justify in terms of juvenile court philosophy unless it is thought of as being insisted upon only where feasible and being in that form, part of the treatment program. Pennsylvania appellate courts have taken the view that juvenile courts may, as part of the probation program, require some form of restitution but only to emphasize to the offending youth the seriousness of his delinquency and not to merely make good the loss incurred.[2] Illinois and New York make no mention of restitution in their juvenile court laws, but California both permits forced payments to the state for traffic violations and authorizes ordering

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[1]One judge reportedly required delinquents to wear bright orange vests lettered "I am a Vandal." Sherman, ". . . Nor Cruel and Unusual Punishments," p. 82.

[2]Compare In re Trignani, 148 Pa. Super. 142, 24 A.2d 743 (1942), with In re Weiner, 176 Pa. Super. 255, 106 A.2d 915 (1954).

wards of the court to earn money to effectuate reparations for damages.[1] Neither the Standard Juvenile Court Act nor the Children's Bureau recommendations specifically deals with this question.

Even without statutory authority and contrary to what the Pennsylvania appellate courts think should be the rule, juvenile court judges in various states have reportedly used this "treatment method" because they believed it proper in a given case.[2] This is not surprising considering that the charges are frequently not pressed, or are lowered, where there has been monetary restitution, and that where there is a conviction evidence of restitution is frequently received at the sentencing stage as an indication that the individual convicted has repented and deserves a relatively light sentence. With or without statutory sanction, there is, however, the practical difficulty of developing a reasonable and standard test for determining whether restitution is to be a factor, and applying it in a manner which minimizes possible constitutional objections of both a procedural and substantive sort.[3]

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[1]This amount may not exceed $50. A youth may also be fined up to $25 for violating the fish and game laws. Cal. Wel. and Inst. Code, sec. 564(2)(c), sec. 564.5(b) and sec. 730 (West 1970 Supp.).

[2]Sophia P. Breckinridge and Edith Abbott, The Delinquent Child and the Home (New York, New York: Charities Publication Committee, 1910), p. 239.

[3]Fradkin, "Disposition Dilemmas," p. 128.

Double Jeopardy

After the juvenile court has concluded action in a delinquency case, it is not entirely unknown for criminal proceedings to be instituted against the youth arising out of the same actions on which the delinquency petition was based.[1] There is conflicting authority as to the constitutionality of such proceedings. The United States Supreme Court in 1969 made the Fifth Amendment's prohibition against double jeopardy directly applicable upon state criminal proceedings.[2] The prohibition is also set forth by practically all states in their own constitutions. A number of jurisdictions have, however, permitted criminal prosecutions following delinquency trials using the well known rationale that proceedings to establish delinquency are not criminal in nature and therefore no jeopardy attaches at that point.[3] More enlightening is a recent federal appellate court decision which overturned a state criminal conviction based upon the same actions under which a state delinquency

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[1]For a general discussion on double jeopardy as it applies to juvenile courts, see "Double Jeopardy Applied to Juvenile Proceedings," Minnesota Law Review, XLIII (May, 1959), 1253-1258.

[2]Benton v. Maryland, 395 U.S. 784 (1969).

[3]See People v. Silverstein, 121 Cal. App.2d 140, 262 P.2d 656 (1953), Moquin v. Maryland, 216 Md. 524, 140 A.2d 914 (1958), and Brooks v. Boles, 151 W.Va. 576, 153 S.E.2d 526 (1967).

adjudication was reached.[1] Under the federal juvenile delinquency statute, criminal prosecutions by the national government are prohibited once delinquency proceedings have been instituted.[2] Involved in the developing ban on double jeopardy are two proceedings based on the same act, even if one be a delinquency and the other a criminal proceeding, and regardless of whether the two proceedings are by the same or different jurisdictions.[3]

The Illinois statute prohibits subsequent criminal prosecutions based on the acts leading to an adjudication of delinquency. The law reads on this point:

> Taking of evidence in an adjudicatory hearing in any such case [involving criminal actions] is a bar to criminal proceedings based upon the conduct alleged in the petition.[4]

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[1] Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968). Appellant, via habeas corpus proceedings, had his murder conviction reversed on the grounds that after being adjudged a delinquent, a subsequent trial for murder, the basis of the delinquency petition, violated "fundamental fairness." The Benton case, overruling Palko v. Connecticut, 302 U.S. 319 (1937), had not yet been decided.

[2] 18 U.S.C. sec. 5031 (1964).

[3] At present, however, successive state-federal prosecutions are constitutionally permissible. Bartkus v. Illinois, 359 U.S. 121 (1959), held permissible a state prosecution after a defendant had been acquitted of the same act by a federal court. The same rule applies to federal prosecutions after a state trial. Abbate v. U.S., 359 U.S. 187 (1959).

[4] Ill. Rev. Stat. (1969), c. 37, sec. 702-7(3). There is no explicit statutory prohibition against juvenile court proceedings subsequent to criminal prosecution.

Not every juvenile court attention to a delinquency is, however, of sufficient moment to be viewed as having placed the individual in jeopardy. In 1968 the Illinois Supreme Court was faced with the issue of whether a detention hearing held by a juvenile court in which a witness appeared and testified against the respondent, placed the juvenile in jeopardy, thus rendering his subsequent criminal conviction constitutionally invalid. The court held that such detention hearings were comparable to a preliminary hearing in a criminal case to determine if probable cause exists to hold the accused for grand jury action and no jeopardy attaches at such proceedings.[1]

The California law would seem less rigorous than the Illinois provisions relating to criminal prosecutions of juveniles subject to juvenile court jurisdiction. In California any person sixteen years of age or older who is before the juvenile court by reason of violation of any criminal statute, may at any time during the hearing be transferred to criminal court.[2] Only by denying that jeopardy has attached to whatever stage the delinquency hearing has reached at the moment of transfer can this practice be upheld against former jeopardy challenges.[3]

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[1] People v. DePoy, 40 Ill.2d 433, 240 N.E.2d 616 (1968).

[2] Cal. Wel. and Inst. Code, sec. 707 (West 1970 Supp.).

[3] See People v. Silverstein, 121 Cal. App.2d 140, 262 P.2d 656 (1953).

In New York the family courts are given exclusive original jurisdiction over all youths over seven but under sixteen years of age alleged to have committed a criminal act, except where the penalty involves life imprisonment or the death sentence if done by an adult.[1] No provision for transfer to criminal courts exists. Since the family court jurisdiction is determined by the age of the respondent at the time the delinquent act allegedly was done, there would seem to be a prohibition against criminal action being brought with respect to any youth subject to family court jurisdiction.[2]

Double jeopardy may also become an issue when a juvenile court terminates delinquency proceedings and at a later date holds a second delinquency trial based on the charges filed in the original petition. Although such cases are rare, a Texas appellate court in 1968 ruled on this point. The court accepted the non-criminal nature of the juvenile court but then said that, because personal liberty was at stake, the respondent was guaranteed at least the protection against twice being placed in jeopardy.[3]

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[1]N.Y. Family Court Act, sec. 713 (McKinney 1963).

[2]See In re Williams, 49 N.Y. Misc.2d 154, 267 N.Y.S.2d 91 (1966).

[3]Collins v. Texas, 429 S.W.2d 650 (Tex. 1968).

Appeals and Records

Opinions to the contrary notwithstanding,[1] there is general agreement as to the desirability of providing some form of appeal mechanism from juvenile court orders.[2] The President's Commission on Law Enforcement summarized the case for allowing appeals from juvenile courts as follows:

> The quality of justice in the juvenile court system has . . . been adversely affected in several ways. First, there has been no appellate forum to rectify errors and injustices in particular cases. Second, the system has been deprived of the kind of sustained examination and formulation of law and policy that appellate review can provide. Third, it has not been possible to develop, through appellate review, uniform application of the law throughout a State.[3]

While states are not constitutionally obliged to provide for a formal appeal from any trial court,[4] the established rule seems to be that there must be some channel for asserting a denial of constitutional rights in the original court. Hence, absent any appeal mechanism, cases could go to other courts by habeas corpus or somewhat similar actions, or be

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[1]See Negley K. Teeters and John O Reinemann, The Challenge of Delinquency (New York, New York: Prentice-Hall, 1950), p. 334.

[2]See S.J.C.A., p. 62, and Standards, pp. 78-79.

[3]Task Force Report, p. 40.

[4]Am. Jur.2d, "Juvenile Court," sec. 60. It will be recalled from an earlier comment on page 135 that the Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956), required that indigents in criminal cases must be supplied free of charge with a copy of any court record necessary for an adequate appeal.

taken directly to the United States Supreme Court by certiorari.[1]

Conflict exists on the point of whether an adjudication of delinquency with final court disposition still pending is an appealable order.[2] As will be recalled, in In re Whittington[3] the Supreme Court rejected the argument of the Ohio prosecutor that the determination of delinquency per se is not a final order and thus not appealable. Generally, the fact that a juvenile court may exercise continuing jurisdiction over juveniles after the final order has been entered on the treatment program or disposition, has not had the effect of defeating any right to appeal which the youth may have.[4]

Illinois, like most but not all states, specifically provides for a right of appeal from juvenile court orders.[5]

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[1]For a discussion of the advantages and disadvantages of habeas corpus appeals, see Mary B. Ortbals, "Appellate Review of Juvenile Court Proceedings and the Role of the Attorney," St. Louis University Law Review, XIII (Fall, 1968), 93-94, and for a discussion of collateral attacks in general, see Norman M. Garland, "Collateral Attack on Juvenile Court Delinquency Decisions," Journal of Criminal Law, Criminology and Police Science, LVII (June, 1960), 136-144.

[2]See Addison M Bowman, "Appeals from Juvenile Courts," Crime and Delinquency, XI (January, 1965), 63-77.

[3]391 U.S. 341 (1968).

[4]Am. Jur.2d, "Juvenile Courts," sec. 60.

[5]Orman W. Ketcham and Monrad G. Paulsen, Cases and Materials Relating to Juvenile Courts (Brooklyn, New York: The Foundation Press, 1967), pp. 76-77. For Illinois law, see Ill. Rev. Stat. (1969), c. 37, sec. 704-8(3).

Under the Illinois statute, any adjudication of wardship[1] is a final judgment for purposes of appeal. Moreover, the state's laws provide that indigent persons convicted of felonies can obtain without charge, a copy of the record on which the appeal is based, and this provision has been extended by the Illinois Supreme Court to all appeals from the juvenile court.[2] In In re Boykin[3] the state high court decreed that the proper analogy to a delinquency adjudication is to a felony rather than to a misdemeanor, thus extending the provisions of the law relating to free court records to indigent juvenile appellants. A standing court rule was adopted to effectuate this decision.[4] This rule would seem, at the very least, to require that a record be made at all delinquency hearings in which the charges are denied. In Cook County the juvenile court is reported to be requiring the presence of court reporters in all such hearings, presumably including non-contested ones.[5]

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[1]A "ward of the court" is a minor subject to the dispositional powers of the juvenile court. Ill. Rev. Stat. (1969), c. 37, sec. 701-18.

[2]Ill. Rev. Stat. (1969), c. 110A, sec. 607(b).

[3]39 Ill.2d 617, 237 N.E.2d 460 (1968).

[4]Ill. Rev. Stat. (1969), c. 110A, sec. 661(a).

[5]Arthur L. Dunne, "14th Amendment, The Bill of Rights and the Juvenile Delinquent," Chicago Bar Record, XLIX (November, 1967), 66.

California has also statutorily provided for appeals from juvenile court orders and decrees, and by a 1967 amendment to its statute provided for free transcripts for all, using as its test of indigency whether the individual had been able to provide his own attorney.[1] In California there must be an official record made of every juvenile court hearing conducted by a juvenile court judge.

New York has provided for appeals from the family court and established a clerk for each county family court to keep the court records.[2] Although there is no specific statutory right to a free transcript of the proceeding for appeals,[3] there is its equivalent in the form of reimbursement of all appeal costs incurred by the juvenile's guardian ad litem or the law guardian.[4]

Note must here be taken of actions which seek, retroactively, to expunge the record of a delinquency proceeding.[5] An expunged record is one which may be considered never to

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[1]Cal. Wel. and Inst. Code, sec. 677 and sec. 800 (West 1970 Supp.).

[2]N.Y. Family Court Act, sec. 216 and sec. 1111 (McKinney 1969-70 Supp.).

[3]For further discussion, see Ortbals, "Appellate Review," p. 100.

[4]N.Y. Family Court Act, sec. 1117 (McKinney 1969-70 Supp.).

[5]See Aidan R. Gough, "Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status," Washington University Law Review, 1966 (April, 1966), 149.

have existed in so far as the law is concerned. Most states have no provision for such expungement, but some juvenile court judges have been reported doing this without statutory authority as a kind of pardon not based on innocence but on assumed rehabilitation.[1]

Of the three states here examined in some detail, only California has at this writing included within its juvenile court statute a procedure akin to that of expunging court records. After five years has elapsed, a former ward of the court may petition the court to have all records concerning his earlier offenses sealed.[2] This also includes police arrest records. If the intervening period included no convictions for felonies or for misdemeanors involving "moral turpitude," and the juvenile's rehabilitation has been attained to the court's satisfaction, the court is obliged to order the records sealed as requested. The effect is to eliminate future examination of the juvenile court's action. There is, of course, no question of constitutional import involved in such expungement or record sealing. It is merely an act of legislative benevolence.

Although Illinois and New York do not have statutory provision for record sealing or expungement, they do make provision for separating arrest and court records from those

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[1]"Rights and Rehabilitation," p. 288.

[2]Cal. Wel. and Inst. Code, sec. 781 (West 1970 Supp.).

of adults, and further provide that public scrutiny of such records shall not be permitted.[1] Interested parties may, however, obtain permission to inspect the records of juveniles from the presiding judge.

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[1] Ill. Rev. Stat. (1969), c. 37, sec. 702-8 and sec. 702-10. N.Y. Family Court Act, sec. 784 (McKinney 1963).

CHAPTER VIII

SUMMARY AND CONCLUDING REMARKS

In the above chapters primary focus has been given to the establishment and operation of a system of American juvenile justice with special attention directed at the Illinois experience. Some 70 years have elapsed since the creation of the first juvenile courts. During that time there have been considerable changes within the courts themselves and in the approach taken by students of the juvenile justice system. The courts have changed in technique from that of a benevolent but stern surrogate parent with but few procedural restraints, to a formal judicial hearing, at least in so far as due process requirements are concerned. Students of juvenile courts have likewise changed in approach. From a position of deep concern with individualized treatment and rehabilitation, they have more recently focused upon the internal operations of the court and encouraged the adoption of at least minimum standards of procedural due process. It might be said that the most prominent students of juvenile justice are no longer social reformers, having been replaced by hard-headed constitutionalists. Even with these changes, however, both the court and its observers have a common goal; that of protecting errant youth from the harshness of criminal justice.

Juvenile Justice Established

The concept of a separate system of justice for juveniles has roots that may be traced to two fundamental concepts: parens patriae and individualized justice. The first provides the legal justification for governmental assumption of parental duties and the second describes the procedure by which the state deals with children in need of special care. While there is little doubt about the legal justification for the use of parens patriae jurisdiction over dependent and neglected children, its use to justify informal procedures in dealing with delinquents is open to challenge. This legal gap between the historically justified use of parens patriae authority in dependency and neglect cases, and the institution of special procedures in delinquency cases was bridged with certain theories of social causation. Just as the crown protected the property and welfare of children, so too would the modern industrial state protect its children from being drawn into a life of crime.

The system of juvenile justice had as its ultimate goal the drastic curtailment or elimination of juvenile crime. To achieve this admirable end, more than separate facilities for adult and juvenile criminals was deemed to be necessary. A whole set of structures eschewing traditional modes of operation were established. Supplementing the so-called

"houses of refuge" and other facilities designed to care for errant and dependent children, state after state adopted statutes providing for special courtroom procedures to deal with children in need of special care from the state. Particularly during the first two decades of this century there was a rush to follow the example set by Illinois in 1899.

Within the juvenile courts the traditional role of the judge in Anglo-American jurisprudence of an "umpire" in an adversary proceeding was altered to that of an active participant in a "quasi-inquisitory" hearing. Relying on the medical, sociological, and psychological disciplines, the judge was expected to take a paternal attitude toward the youths appearing before him and yet, at the same time, to protect society from their anti-social behavior. All too often it was found that the judge himself was ill equipped to perform this formidable task. Not only was his training often inadequate, but so too were the resources available to him both in terms of court personnel and treatment facilities. It was not uncommon for the juvenile court to be in reality nothing more than a branch of the local trial court using informal procedures. Indeed, even the personnel was frequently the same for each court.

Despite the many gaps between what was desired and what was achieved, the early judicial interpretations generally were favorable to juvenile courts. The opinions prior to 1899 commonly reflected a willingness to see the <u>parens</u>

patriae doctrine used as a legal foundation for state involvement in the socialization process of children who would otherwise be denied such guidance, or who had indicated their intransigence to the demands of society. Utilizing these interpretations, appellate courts in the first four decades of the Twentieth Century provided the constitutional justification necessary for their continued operation. Because juveniles were being helped not punished, there was no constitutional requirement that they be given the same protections afforded to accused criminals. This rationale was applied to accused delinquents as well as to dependency and neglect cases. It was essential that the juvenile courts be viewed as non-criminal in nature, and the decisions of appellate courts for forty-odd years accepted this as a valid premise with but scant objection.

In the decade preceeding the Gault decision there was a renewed interest in the procedures and structures surrounding the system of juvenile justice. Coinciding with scholarly criticism of many practices in juvenile court was a rising number of appellate decisions questioning previously unassailable assumptions. In addition, at least three of the most populous states in the nation had, since 1960, fundamentally altered their juvenile code. Scholarly studies were also forthcoming at a rate far surpassing anything in the past. All aspects of the administration of

juvenile justice were being subjected to inquiry and examination, and was generally in a state of flux at the time of the first Supreme Court consideration of the issue.

Supreme Court Action in General Perspective

Quite clearly, juvenile justice in the United States has undergone changes of major proportions since the turn of the century when the movement began. Although the decision of the Supreme Court in the Gault case may correctly be interpreted as the peak or culmination of a series of efforts to change procedures in juvenile courts, as is so often true, Supreme Court action was preceeded by years of premonitory events.

All three of the states here studied in some detail saw the advance signals of what was forthcoming and revised their juvenile court statutes extensively in the period just prior to the Gault case. In California the concern over the administration of juvenile justice is specially evidenced in the extensive study made by the California Governor's Commission in the late 1950's and early 1960's. In Illinois the kinds of inquiries conducted by the Legislative Council, the state legislature's research arm, are alone sufficient to evidence the same concern. Similar information gathering programs were instituted in New York. At the national level in the period prior to the Gault decision, juvenile justice

had undergone detailed examination at the hands of the President's Commission on Law Enforcement. Throughout the nation, moreover, scores of periodical articles urged legislators to revise statutes relating to juvenile justice and appellate courts to invalidate juvenile court procedures that did not meet the highest standards.

To a very real degree then, the Gault case was merely the most visible aspect of a broad movement to "legalize" and "formalize" juvenile court procedures. When the Supreme Court of the United States did speak, it did so in terms of constitutional doctrine on a first-time basis, and when views so expressed touch the foundations of some past practice, the effect may well be termed revolutionary. However, the opinions filed in Gault give ample evidence that the high court thought of its decision as the climax of a considerable re-evaluation movement and not a bolt from the blue. The status quo in juvenile justice had increasingly come under attack from informed sources, and the majority opinion recites indications of widespread dissatisfaction with the way in which juvenile courts were functioning.

Judicial process analysis will, further, discover in the Gault case the heritage of two Supreme Court members of an earlier era. The oft-quoted statement by Justice Oliver Wendell Holmes that the life of the law is more experience than logic[1] is applicable because of the sharp terms

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[1]Oliver Wendell Holmes, The Common Law (Cambridge, Massachusetts: Belknap Press, 1963), p. 1.

in which the court contrasts the theory of the juvenile court movement with its actual operations. The sociological briefs associated with Justice Louis D. Brandeis have found their counterpart in Justice Fortas' heavy reliance, in both the Gault and Kent decisions, on factual data gathered outside the confines of the particular case at hand. Some of this data, at least, was compiled on his own initiative without citation to the court in the briefs and arguments. Sources specifically mentioned the parens patriae rhetoric sufficiently to see clearly the frequent denials of due process of law which the ideology camouflaged.

The evaluations of juvenile justice available at the time of the Gault case seem, moreover, to have encouraged the court to speak authoritatively on several points which had little intimate association with the particular litigation before it. For example, the court cited several studies reporting on the widespread lack of pertinent legal training and judicial expertise on the part of juvenile court judges. Other scholarly reports were utilized to support the conclusion of the majority opinion that the term "delinquency" involved only slightly less stigma than that of "criminal."

It was, however, in the area of right to representation by counsel at the delinquency trial that the court utilized the greatest amount of miscellaneous information. Noting that many authorities on juvenile justice had in recent

years demonstrated increasing recognition of the need for attorney representation, the court quoted at length from the President's Commission on Law Enforcement to the effect that the presence of counsel in juvenile courts holds the greatest potential for achieving procedural justice for the child. The court took particular cognizance of materials approving the New York system of law guardians as a means of making effective the right to legal representation, and of emerging feelings that the use of hearsay testimony in juvenile delinquency trials impaired the fact-finding process in a fashion that is unfair to the accused offender.

The three other juvenile justice decisions of the high court dealt with here concerned rather limited aspects of the problem and were handled by rather brief opinions. Thus, the holdings in these cases do not contain many references to what may be termed "extra-judicial" materials. However, in the Winship opinion, Justice Brennan took cognizance, among other things, of the fact that adoption of the reasonable doubt standard in place of the civil case preponderance of evidence rule, had been urged by several organizations concerned with the administration of juvenile justice in the United States.

One is moved to speculate what the outcome of the Gault decision would have been had available appraisals of the juvenile court system shown that the philosophical rhetoric was lived up to in practice. Would the decision have been

the same had it been shown that juvenile court judges and their staffs had high qualifications, that minimum procedural fairness was guaranteed, and that low rates of recidivism existed? Certainly, in such a set of circumstances there would be less sociological justification for a compelled assimilation to the techniques of the criminal courts.

Conjecture along such lines may not go far in clarifying abstract legal logic, but the actual course of future litigation over juvenile justice may depend heavily upon all the operative facts available to the Supreme Court. It may be hypothesized, if not actually concluded, that where scholarly findings indicate prejudicial treatment of a harmful nature there is considerably greater likelihood of high court condemnation of the procedures involved than where such scholarly criticism is absent. If, for instance, it can be demonstrated that juveniles are frequently and systematically being adjudged delinquent on the basis of extra-judicial confessions obtained in the absence of a Miranda warning, such findings would seem likely, given the court's reliance on similar studies in Gault, to have the effect of helping to convince the court of the need to make Miranda warnings constitutionally required before extra-judicial confessions can be used as the basis for a delinquency finding. Further, it is not inconceivable that the court could be convinced that even with a Miranda warning

juveniles may be insufficiently mature to intelligently waive their constitutional rights and privileges. Again, a great variety of legal and non-legal data may provide the court with information on which to base a rational decision and evolve a workable formula. Given the court's recent history of reliance upon wide-ranging research and experimental data, future decisions in the area of juvenile justice are not likely to be made as matters of logic only.

Some Assessments of Implementation and Impact Problems

Of the procedural changes which seem demanded at this writing by the Gault and related decisions, two requirements would seem of secondary significance in terms of difficulties of compliance and potential impact on the system of juvenile justice in Illinois.[1] These are: (1) notice of

[1]Because this inquiry is devoted primarily to Illinois juvenile justice, this concluding section omits specific reference to other states mentioned in earlier chapters. Further, as a broad field of inquiry, the implementation and impact of Supreme Court decisions is beyond the scope of this study. This section is offered only as hueristic observations and impressions rather than as solid factual data. For more rigorous investigation into the subject of implementation and impact of court decisions, see the following: Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives (Homewood, Illinois: The Dorsey Press, 1970); Richard J. Medalie, Leonard Zeitz, and Paul Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda," Michigan Law Review, LXVI (May, 1968), 1347-1422; and Theodore L. Becker, ed., The Impact of Supreme Court Decisions: Empirical Studies (New York, New York: Oxford University Press, 1969).

impending delinquency proceedings and its related specificity of charges, and (2) insistence upon proof beyond a reasonable doubt to establish delinquency. The former requirement should cause no serious difficulties of implementation. Some form of notice has long been a part of the juvenile courts throughout the United States, and a requirement of specificity of charges in the notice should not prove difficult to implement. This would merely make mandatory a detailed explanation of the charges on which the delinquency petition is based. To the degree that many more juveniles will now receive specific charges than has been the case in the past, there would be greater opportunity to prepare an adequate legal defense to the charges. This writer speculates, however, that the most likely result from this one change will be the elimination of particularly conspicuous instances of a lack of fundamental fairness rather than any substantial overall increase in the proportion of successful defenses against delinquency petitions.

The requirement that delinquency be established beyond a reasonable doubt also appears to involve only minor difficulties in terms of compliance. A juvenile court judge would merely apply rules of evidence applicable to criminal courts. In Illinois this is already required and there is, to date, no indication that the change in burden of proof requirements is having a serious impact upon juvenile court functioning. Because, however, the amount of proof required

is increased, it may well actually be resulting in a higher frequency of petition dismissals.

The requirements of Gault that seem likely to create major compliance problems or have impact sufficient to cause fundamental changes in juvenile court operations are three: (1) full protection against self-incrimination; (2) right of confrontation and cross-examination; and (3) right to counsel. For Illinois, only the first area represents uncompleted statutory modifications but all three items, and especially protecting the right to counsel, pose several continuing problems.

With regard to self-incrimination, the main problem is insuring that any waiver is both voluntary and intelligently based. Whether or not a juvenile is sufficiently knowledgeable of the consequences to be capable of intelligent waiver is no easy matter to decide. But even such implementation issues aside, the impact of this aspect of the Gault decision is likely to be profound indeed. Widespread institutionalization of meaningful protection against self-incrimination may strike a fatal blow to the traditional view that confession is a rehabilitative process to be encouraged by juvenile court officials. Juvenile court judges could then no longer use as a basis of their determination whether there was a recalicitrance by the youth to admit his complicity in the charges against him. Where the charges are denied and the youth refuses to provide the

court with a confession, the delinquency proceedings will become more formal in nature and take on the trappings of criminal prosecutions. It is not known at this writing to what extent accused delinquents in Illinois are in fact making use of their constitutional privilege not to incriminate themselves in delinquency proceedings.

Protecting the right to confrontation of witnesses, also now guaranteed in Illinois, is less a problem of implementation than of impact. Judges can, quite readily, and with no great burden, insist on compliance with such a right. If they do, however, then there is still the consideration of persons willing to discuss matters with a court officer in private and becoming reluctant to testify to the same matter in court and be subject to cross-examination. The impact of this requirement will, in addition, likely alter the traditional role played by the probation officer in making pre-hearing investigations and recommendations to the judge. Certainly it would be improper for the court to consider the probation officer's so-called "social report" in making his factual determination of delinquency unless the report's findings are made available to the respondent for rebuttal. Prior to Gault it was not uncommon for juvenile courts to utilize such reports.

Any contention that Illinois juvenile courts will be spared implementation and impact problems resulting directly from the requirements of Gault respecting a right to counsel,

is true only in the sense that the Illinois legislature anticipated the Supreme Court through its 1965 statutory revision. The right to counsel is now expressed statutorily, but this does not solve difficulties of finding sufficient numbers of attorneys to represent indigent accused delinquents, especially when increasing numbers of respondents make use of this right. The proportions of this problem are still changing so rapidly that information adequately illuminating developments and as yet unmet needs cannot be expected for some time to come.

There can be little doubt, however, that appreciable increases in the frequency with which attorneys are utilized in the juvenile courts mean fundamental changes in court procedure, most probably along lines of formalizing the hearing. Certainly an attorney would be remiss in his professional duties if he did not insist upon procedural regularities sufficient to protect the legal interests of his client, and it is his responsibility to weigh especially carefully any proposed non-insistence upon such constitutional rights of a procedural character.

Turning to those procedural changes not yet mandated by decisions of the nation's highest court but likely to be required in the near future, there can again be seen some alterations that will present Illinois with relatively modest problems of implementation and resulting impact. These include: (1) extension of the "exclusionary rule" of the

Mapp decision; (2) protecting the immunity from double jeopardy; (3) affirming the right to bail; (4) guaranteeing the right to a public trial; and (5) guaranteeing the right to a jury trial. Illinois statutory changes anticipated the United States Supreme Court action in the areas of application of the exclusionary rule against illegally seized evidence and the ban on double jeopardy, and implementation requires little more than adherence by the state's judges to the statutes. The main impact is likely minimal with legalistic debate being time-consuming. Decisions on the merits are not likely to be difficult in any great proportion of the cases.

The issues of right to bail, jury trial, and a prompt public trial must be viewed somewhat differently in so far as Illinois is concerned. In these areas Illinois as yet makes insufficient statutory provision for protecting a juvenile's rights. However, should the nation's highest court require full protection of these rights in all juvenile courts, only minor problems of implementation and impact would present themselves.

Because juvenile courts make regular use of the practice of releasing accused delinquents to the care of their parents or guardians, a monetary bail provision would be invoked only in limited cases, where other release was denied. Given the likelihood of infrequent use of this provision even if it were implemented, one is left with the

conclusion that its impact upon juvenile courts would be minimal. Implementation would, in any case, be simply a matter of empowering the court to accept bail.

Firmer guarantees of the package of rights associated with a jury trial would be really burdensome in terms of implementation and consequential in terms of aggregate impact only if extensive use were actually made of the rights. Actually, it may be that the right to a jury trial, as known to the criminal law, would be asserted more as a matter for its later waiver, after the fashion of plea bargaining in the criminal courts. If, however, there were an extensive use of juries in delinquency trials as a result of statutory change or constitutional interpretation, the impact on juvenile courts would indeed be significant. There would be delays plus procedures generally making delinquency hearings more costly by requiring the expenditure of greater amounts of resources.

Impending reforms that would, in contrast, have considerable impact upon the entire system include meaningful protection against involuntary self-incrimination through application of Miranda requirements on juvenile delinquency proceedings. However, there is no reason for believing that juveniles would be inclined more than adults to claim their constitutional privilege against self-incrimination, and evidence exists to show that where the privilege is afforded adults, waiver is not uncommon. Nevertheless, to the extent

that some decrease in the number of confessions would result from widespread use of the Miranda requirements in cases of juvenile offenses, there would seem to be some impact upon the administration of juvenile justice. Moreover, problems of implementation in this area may be more difficult where juveniles are concerned than in arrests of adults. Not only are problems of police recalicitrance to Supreme Court requirements present, but so too are the "special problems" of insuring that any confession obtained from a juvenile is knowledgeable and voluntary.

For Illinois, the imminence of high court frowning on unduly elastic procedures for waiving juvenile court jurisdiction or otherwise effecting transfer to the criminal courts has particular bearing. Concerning the waiver of juvenile court jurisdiction, the Illinois statute requires only that if the juvenile court judge objects to criminal prosecution of a juvenile the chief judge of the circuit shall resolve the matter. None of the requirements of the Kent case are met in the terms of the statute and it cannot be safely assumed that actual court practices in allowing criminal court procedures as an alternative reflect acceptable standards. Implementation of the Kent requirements in Illinois would require fundamental changes in the pre-trial procedures necessitating statutory modification. Provision would have to be made for waiver hearings, complete with guarantees regarding the right to attorney representation.

The broader impact of Kent's application in Illinois would be considerable. The role of the Illinois State's Attorney would be altered. Whereas the present procedures lay the burden of proof upon the juvenile court judge to demonstrate that criminal prosecution is undesirable, a formal hearing on waiver before the juvenile court judge would require the prosecution to explain why criminal proceedings should be instituted. Whether such application of Kent would affect the proportion of juveniles brought to trial in criminal courts cannot be accurately predicted at this time.

As can be seen, the Illinois juvenile court system is vulnerable to constitutional challenges in several areas. To meet these potential changes of denial of constitutional rights the writer recommends the following: (1) clarification of the juvenile court statute to specifically include the requirement that delinquency charges be spelled out with particularity; (2) amending the law to require before any questioning occurs, clear warning be given to the juvenile and his parents that any statements made by the youth will be used against him and that he is not required to make any statement; (3) complete revision of the proceedings by which juveniles are "transferred" from juvenile to criminal courts along lines enunciated in the Kent case to insure that procedural regularity and due process will be met in this "critical" stage of the process; (4) inclusion in the statute of the right to bail as it is given to adults

accused of crime; (5) inclusion in the statute of the right of the juvenile to request and receive a public trial; and (6) inclusion in the statute of a provision permitting jury trials.

These recommendations are designed to meet what, in the writer's judgment, are the most serious constitutional points of stress in the Illinois juvenile court statute. Adoption of these suggestions, and full utilization of their benefits by persons brought before the juvenile courts, would make for further identity between delinquency and criminal proceedings, but this appears to be inevitable whatever one may think of its desirability.

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CASES CITED

APPENDIX

QUESTIONNAIRE FOR ILLINOIS CHIEF CIRCUIT JUDGES

J. RILEY
DEPARTMENT OF GOVERNMENT
SOUTHERN ILLINOIS UNIVERSITY
CARBONDALE, ILLINOIS

1. Have you implemented Section 8 of the Judicial Article relating to the creation of divisions, general or specialized, in your circuit?

   ( ) Yes No ( )

   If Yes, please identify these divisions:

   _____

   _____

   _____

2. Have you created a Juvenile Division?

   ( ) Yes No ( )

   If Yes, (a) Please identify the Judges or Magistrates in that Division and the geographical location of their Court.

   _____

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(b) Please describe the procedure used in the selection of Judges to preside in the Juvenile Division and identify those factors most important in their selection.

3. If no Juvenile Division exists within your circuit, do each of the Judges and Magistrates hear cases under the Juvenile Court Act or is there an informal specialization within the Circuit?

( ) no informal specialization

( ) some variety of specialization

If some form of specialization exists please describe its operation and identify the Court personnel involved and their geographical location.

4. If no Juvenile Division exists within your Circuit, are there nevertheless special facilities utilized in the handling of juvenile matters arising under the Juvenile Court Act?

( ) Yes No ( )

If Yes, please describe the facilities and their operation in your Circuit.

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VITA

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Juvenile Justice and In re Gault: An Analysis of Procedural Alteration in Juvenile Courts with Special Reference to Illinois

Adviser - Professor Jack Isakoff